

## The Central Law Journal.

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ANOTHER stage has been reached, in the war that has been waging, in the State of Illinois, as to the right of boards of trade to control the dissemination of market reports. It will be recalled that, some time ago, the question as to the right of the Chicago board of trade to discriminate between persons, in the dissemination of its market quotations, was decided adversely to that body by the Supreme Court of Illinois. The court held that these reports, though private property, had become affected with a public interest, and that interest having once attached, there could be no unjust discrimination against the public. The question presented was, not as to the right of the board to withhold the reports altogether, or to discriminate between members and non-members, but the contention was as to the right to discriminate between persons who were not members of the board, and the court very properly negatived such right. Three judges of the Chicago circuit court have lately rendered decisions, to the effect that the Chicago board of trade has no right to withhold quotations from non-members, who desire to use them for lawful purposes, subject to such reasonable charges as might be imposed, thus extending the doctrine as announced by the supreme court. The disposition of this case on appeal will be watched with interest. On the one hand it may be contended that the furnishing of reports to members is not a furnishing of the same to the public, within the meaning of the supreme court decision, in which case it might with reason be said, that a public interest had not attached such as to prevent discrimination between members and non-members. But in view of the broad and comprehensive language of the supreme court, it is difficult to see how the circuit judges could have decided otherwise.

THE national convention which assembled in St. Louis last February, for the purpose of formulating a national bankrupt act, did nothing except to indorse the Lowell bill, VOL. 29—No 6.

which has, from time to time, been presented to congress but failed of passage. A committee was appointed to draft a national bankrupt law and the convention adjourned to meet in Minneapolis on September 8. It is to be hoped that some substantial results will be accomplished by this convention in the direction of a national bankrupt law, but it must be confessed that the desire for such an enactment is not as strong throughout the country as might be expected. The Lowell bill was an excellent measure in many respects, but it was not vigorously pushed in congress. Its chief fault seemed to be, that it embodied the primitive idea, which obtains in the English bankrupt law, of disciplining the debtor. Creditors, as a general thing, are only interested in the speedy and economical distribution of the debtor's estate, and the kind of law which congress should pass is one which should secure justice between debtor and creditor in the surrender of all the assets and their equitable distribution. The three bankrupt laws which congress has passed, it is said, were enacted at the instance of the debtor class, after seasons of financial stress, and were repealed when they had served the debtor's purpose. The act of 1800 was repealed in 1803; that of 1841 was repealed in 1843; that of 1867 in 1879. The history of bankruptcy legislation shows that laws of a disciplinary character will fail of public approval. In this country, the effort should not be to permanently disable debtors by terrorizing statutes. A fair percentage of bankrupts are honest, and legislation of this character, while providing for justice between debtor and creditor, and effectively securing and distributing a debtor's assets, should be free from the punitive feature which subjects him to merciless resentments, and prevents him from making an honest effort to start in business life again.

THE law, passed by the New York legislature, making death by electricity the penalty in capital cases, was intended to go into operation last January, as a very humane and practical plan for disposing of culprits. But the very first victim takes exception to the method, and stupidly and doggedly refuses to take advantage of what was intended by the legislature as a great boon to him. Through his attorney he makes the point,

that such a punishment is "cruel and unusual," which is, in those words, prohibited by the constitution, and the inquiry, which has been going on for some time, to decide whether his electrical execution would be a cruel and unusual punishment, as averred by a number of suddenly philanthropic individuals, would indicate that there may be some delay, at least, in his execution. Expert electricians, who have been called, testify adversely to each other as to the immediate effect of electricity in causing death, and the evidence, so far taken, seems to leave the question in as much doubt as before. When the testimony is all in, the referee will submit his report to the court, and, eventually, the supreme court will declare the law constitutional or otherwise. It seems to be taken for granted, by most of those who have commented on the case, that Kemmler could not be executed in any manner, if the new law should be declared unconstitutional, and that is, of course, the position his lawyers will take. But the courts would certainly be called upon to decide whether or not the clause repealing the old law does not fall with the body of the new law. It was inevitable that a complete departure from all tradition, in the matter of executing criminals, should be followed by a strenuous effort to overthrow the legislation which brought it about, and the controversy involves questions of general interest and importance.

#### NOTES OF RECENT DECISIONS.

THE decision of the Supreme Court of the United States, in *Michigan Insurance Bank v. Eldred*, is interesting, as laying down the proposition that delivery of process to the sheriff or marshal, with intent that it shall actually be served, when relied on to save the bar of the statute of limitations, does not require a manual delivery, and that the same general principle which sustains the presumption that a letter put in due course to be mailed, according to the customary routine of business, or to be delivered, may be presumed to have reached the person addressed. The latter principle is not indeed directly applied nor discussed, but the court holds that the question was one of fact, which

should have been submitted to the jury. The marshal had an office on the floor above the clerk's office. Plaintiff's attorney, on taking out a summons from the clerk's office, filed his application for the summons, called by the Michigan law, after the old common law term, a *præcipe*, and then went immediately to the marshal's office and told him that there was a summons in the clerk's office for service. It was proved by the clerk that the custom of the office was to put processes for the marshal in a box for him, provided for the purpose, near the door of the clerk's office; but sometimes attorneys, taking out summons, took them up to the marshal; at other times it was left for the clerk to put them into the marshal's box, which it was their practice to do when the writ was issued. The trial court refused to allow the jury to infer from these facts delivery to the marshal. The court, in reversing this, says:

But in order to come within the second sentence of that section, requiring the summons to be "delivered, with the intent that it shall be actually served, to the sheriff or other proper officer," it does not appear to us to be necessary that there should be a manual delivery of the summons to the officer in person. It would be sufficient, for instance, if the attorney left it on the marshal's desk or other place in the marshal's office, so that the marshal would understand that it was left with him for service. It would be equally sufficient if the attorney, or the clerk acting by his direction, placed the summons in a box in the clerk's office, designated by the marshal, with the clerk's assent, as a place where processes to be served by him should be deposited, and from which he usually took them daily. The defendant much relies on an opinion of the Supreme Court of Wisconsin, in which it was said that "the fact that the summons was not placed in the hands of an officer of the county in which the action was intended to be commenced, would be fatal to the claim that there was an attempt to commence the action within the meaning of section 4240" of the Revised Statutes of 1878, corresponding to section 27 of ch. 138 of the Revised Statutes of 1858. *Sherry v. Gilmore*, 58 Wis. 324, 334. But in that case there was no service, or attempt to serve, except through the mail; and the court had not before it the question whether depositing a process in a place provided or designated by the officer was equivalent to putting it in his own hands.

THE question as to the right to impeach one's own witness was exhaustively considered by the Supreme Court of Ohio, in *Hurley v. State*. There, the rule is laid down that a party who calls a witness, and is taken by surprise by his unexpected and unfavorable testimony, may interrogate him in respect to declarations and statements previously

made by him, which are inconsistent with his testimony, for the purpose of refreshing his recollection and inducing him to correct his testimony or explain his apparent inconsistency, and for such purpose his previous declarations may be repeated to him, and he may be called upon to say whether they were made by him. In case the witness denies having made such statements, or his answer is ambiguous concerning them, it is not competent for the party calling him to prove them by other witnesses. The court says:

The other question in this case is one of importance, and not free from difficulty. Conflicting views have been expressed upon the subject by eminent judges and authors. The diversity of opinion, however, has not been so much with respect to what the law is as to what it is contended it should be. No reported case has been found where the question has been considered by this court. In the last edition of Greenleaf's Evidence (volume 1, § 444) it is said: "Whether it be competent for a party to prove that a witness whom he has called, and whose testimony is unfavorable to his cause, had previously stated the facts in a different manner is a question upon which there exists some diversity of opinion. On the one hand, it is urged that a party is not to be sacrificed to his witness; that he is not represented by him, nor identified with him; and that he ought not to be entrapped by the arts of a designing man, perhaps in the interest of his adversary. On the other hand, it is said that to admit such proof would enable the party to get the naked declarations of a witness before the jury, operating, in fact, as independent evidence; and this, too, even where the declarations were made out of court, by collusion, for the purpose of being thus introduced. But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify, or that the witness had recently been brought under the influence of the other party, and has deceived the party calling him." In support of the text the following cases are cited in a note to the section: *Wright v. Beckett*, 1 Moody & R. 414, 416, per Lord Denman; *Rex v. Oldroyd*, Russ & R. 88, 90, per Lord Ellenborough and Mansfield, C. J.; *Brown v. Bellows*, 4 Pick. 179; *State v. Norris*, 1 Hayw. (N. C.) 437, 438; *Dunn v. Aslett*, 2 Moody & R. 122; *Bank v. Davis*, 6 Watts & S. 285. The high estimation in which Prof. Greenleaf's work on Evidence is justly held by the profession, and its usual accuracy, as well as the importance of the question itself, and the great doubt expressed upon it by the circuit court, may justify a somewhat careful review of the authorities. \* \* \* From this examination, thus made at length, of all the cases cited in Greenleaf's Evidence, and referred to by counsel for the defendant in error, it appears that but one case is found among them (*State v. Norris*, *supra*) which can be regarded as an authority in favor of the proposition that a party may be allowed to prove the previous statements of his own witness which are at variance with his testimony on the trial. To this case may be added the opinion of Lord Denman, and occasional dissenting opinions that may be met with in the reports. Turning, now, to the authorities which deny the admissibility of such

evidence, some of the leading works on evidence may first be noticed. Dr. Wharton, in the last edition of his work on Evidence, says: "By a settled rule of the English common law, while a party may contradict his own witnesses, though this may discredit them, he is not ordinarily permitted to impeach them, even though called afterwards by the opposite side, either by general evidence, or by proof of prior contradictory statements." "In this country," says the same author, "while a party cannot ordinarily discredit his own witness, his right to prove facts inconsistent with those stated by such witness is unquestioned, even though this discredit the witness materially; and he may examine the witness in advance as to such conflicting facts, arraying them, as it were, against him, though beyond this, in the way of impeaching the witness, the privilege does not go." 1 Whart. Ev. § 549. In Phillips on Evidence the English cases are reviewed, and the arguments of Lord Denman in *Wright v. Beckett*, *supra*, in favor of permitting a party to prove the previous contradictory statements of his own witness, are fully presented. The author concludes this discussion of the subject as follows: "It must be admitted, however, that the weight of modern authority is in opposition to the opinion, reasoning and arguments of Lord Denman, above stated." 2 Phil. Ev. (5th Am. ed.) 831. The subject is also discussed in Starkie's Evidence, where the English cases are also reviewed, and the conflicting opinions of Lord Denman and Baron Bolland, in *Wright v. Beckett*, are referred to, and that author says that, "notwithstanding the reasons above suggested, the prevailing opinion seems to be that a party who calls a witness is not at liberty then to impeach his credit and nullify his testimony." Starkie, Ev. (10 Am. ed.) 250. To the same effect is 2 Tayl. Ev. p. 931, § 1049, and Best, Ev. § 645. These conclusions are fully sustained by the reported cases, as an examination of them will show. \* \* \* A diversity of reasons for their contention are given by the advocates of the admissibility of evidence offered by a party to prove contradictory statements made by his witness. One is that it should be admitted in order to set the party right before the jury; another, that it is necessary to prevent a party from being sacrificed by the contrivances of designing witnesses; and still another, that a party should have the same right to impeach his own witness, when his testimony is unfavorable to him, that he has to impeach his adversary's. The last one is chiefly urged by Jeremy Bentham in his Rationale of Judicial Evidence, 70-79, and adopted by Mr. Appleton in his treatise on the Law of Evidence; but it has never received judicial sanction, unless it be found in the opinions expressed by Lord Denman. The first of the reasons stated appears altogether insufficient. The object of judicial inquiry is to determine the truth of the issues. To be of any value, the evidence given should be relevant to the issues. Hence a party may prove any fact material to the issues, though such proof contradict and collaterally discredit his own witness; but he cannot give evidence collateral to the issues, merely to contradict or discredit his own witness. It has never been claimed that such contradictory statements of the party's witness are evidence of the facts so stated. What aid, then, can their proof afford in ascertaining the facts at issue? If without such evidence the party must fail, he must certainly do so with it. The only difference is that in the latter case the party, in addition to having a cause which he failed to prove, would have a discredited witness by whose testimony he attempted to prove it. It is obvious such testimony is wholly irrelevant unless it be competent by way of impeachment; and, if one method of impeachment is

open to the party calling the witness, no reason can be given why every legitimate means of impeachment should not be allowed him. The other reason assigned for the admissibility of this kind of testimony is that without it a party might be sacrificed by the contrivances of an artful witness, who it is said, might through collusion with the opposite party, or from other vicious motive, by favorable statements induce a party to call him, and then testify against him, and in this way ruin his cause, unless proof of the previous statements of the witness be permitted. This is but an argument in favor of the party's right to impeach his own witness, for it must be conceded that no other legitimate effect can be claimed from the proof of the contradictory statements than that of neutralizing the hostile testimony by casting discredit on the witness. Yet while this is its only legitimate effect, the danger of sacrificing one party by admitting it is not less than that of sacrificing the other by excluding it. It is not difficult to understand that the evil consequences to be apprehended from permitting the former statements of a witness, in contradiction of his testimony on the trial, to be proven by the party calling him, may be quite as serious, and the apprehension as well grounded, as any likely to result from adhering to the rule as now established. A person might, from motives of spite or revenge, make statements against the accused in a criminal case which, if true, would be sufficient to convict, for the purpose of having them communicated to the prosecutor, and thus procuring himself to be called as a witness; and if, when put upon his oath on the trial, he testifies truly that he knows nothing about the case, and the prosecuting attorney were then allowed to prove the former statements of the witness, the jury might give them such weight as would turn the scale in a doubtful case, and the revenge of the witness would be gratified. Then, a party might operate upon a witness, by inducing him to make statements in his favor when not under oath, for the purpose of manufacturing evidence in his behalf, and if, when examined by him, the witness should feel the obligation of his oath, and abandon his purpose to testify falsely, or be obliged to do so under cross-examination, the party who operated upon him would be prepared to destroy his credibility by proofs of the false statements he procured him to make, and thus not only prevent his being injurious, when he could not or would not be useful, but have whatever advantage such statements might give him to the jury. The rule that a party cannot discredit his own witness, by proving that he had made statements at other times inconsistent with his testimony on the trial, is the result of long experience, and has been steadily adhered to by the courts of this country and of England. That the rule has generally operated favorably in judicial investigations can hardly be questioned. If it be conceded it has not had that effect in every instance, as much may be said of many well established rules of law, and the general good result is to be regarded, rather than the particular inconvenience; and it may well be doubted whether it is not a sounder rule than that adopted by some statutes, which leave it within the unregulated discretion of each judge to admit such, and only such, testimony as may seem to him expedient.

An interesting question of partnership came before the Supreme Court of Illinois, in *Raymond v. Vaughan*. There, it was held that when one member of a firm is adjudged

insane, and his copartner, without notice to third parties, continues to carry on the business as before, there is no dissolution of the copartnership, and the managing partner must account to the insane partner for his share of the profits. The court says:

The first contention presents a question of the most difficulty. It is said in *Parsons on Partnership*, 465: "There are not wanting strong reasons and high authority for the conclusion that insanity, certain, complete, and hopeless, of itself, and at once, dissolves the partnership; but we think the decided weight of authority in England and in this country opposes this conclusion, and holds that the partnership continues until it is dissolved by decree." Chancellor Kent, 3 Kent, Comm. 58, says: "Insanity does not work a dissolution of partnership *ipso facto*. It depends upon circumstances under the sound discretion of the court of chancery. But, if the lunacy be confirmed and duly ascertained, it may now be laid down as a general rule, notwithstanding the decision of Lord Talbot to the contrary, that, as partners are respectively to contribute skill and industry as well as capital to the business of the concern, the inability of a partner by reason of lunacy is a sound and a just cause for the interference of the court of chancery to dissolve the partnership, and have the accounts taken, and the property duly applied." And the same author (2 Kent, Comm. 645) says: "In cases of partnerships it would at least require a decree in chancery to dissolve the partnership on the ground of lunacy." Story, in his work on *Partnership*, § 295, says: "The common law, \* \* \* upon grounds of public policy or convenience, holds that insanity does not ordinarily, *per se*, amount to a positive dissolution of the partnership, but only to a good and sufficient cause for a court of equity to decree a dissolution." This writer, however, adds: "We say 'ordinarily,' for where the insanity has been positively ascertained under a commission of lunacy, or by the regular judicial appointment of a guardian to the lunatic, it may deserve consideration, whether it does not *ipso facto* amount to a clear case of dissolution of the partnership by operation of law, since it immediately suspends the whole functions and rights of the party to act personally." Mr. Chief Justice Parker in *Davis v. Lane*, 10 N. H. 161, makes the same suggestion. That case was, however, upon the effect of insanity in revoking the power of an agent to act for his principal. Mr. Parsons also seems to be of the opinion that the courts would hold that where the insanity was determined by due inquest it would, *per se*, operate as a dissolution of the partnership. Both Story and Parsons refer, in support of this latter suggestion, to the case of *Iser v. Baker*, 6 Hump. 85, alone, to sustain the text. That case holds that the doctrine indicated by Mr. Parsons, but stands, so far as we have been able to find, unsupported by any adjudicated case, and none are cited by the court in support of its conclusion. *Collier on Partnerships*, bk. 2, ch. 3, § 3; *Gow on Partnership*, ch. 5, § 1, each lay down the rule that a decree of a court of chancery is necessary to a dissolution of the partnership, notwithstanding there has been an adjudication declaring one partner a lunatic. In *Besch v. Frollich*, 1 Phil. Ch. 172, one of the partners had been adjudged insane upon commission of lunacy. Upon bill filed to dissolve the partnership, it was insisted that it should be decreed dissolved from the time of the incapacity of the insane partner. This the court, Lord Chancellor

Cottenham delivering the opinion, held could not be done, and says: "That there are three considerations between partners,—the share of each in the capital; the share of each in the good-will; and the labor which each undertakes to devote to the business. Your argument is that because of one of these considerations, and that, perhaps, the least valuable of the three, falls, you are entitled from that time to take to yourself the whole benefit of the other two."

\* \* \* Whatever delay has occurred is imputable to the plaintiff himself. It was competent for him to have filed his bill at any moment since the time when his partner first became incapable of attending to the business." In *Jones v. Noy*, 2 Mylne & K. 125, the partners were solicitors. One of them, Hardston, became insane, and incapable of attending to business, and died two or three years afterwards. Noy, the other partner, carried on the business one or two years, and then sold it out. Hardston's executors filed a bill to compel Noy to account in respect to the partnership business, and the proceeds of the sale. Sir John Leach, M. R., in determining the cause said: "It is clear upon principle that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement is a ground for determining the contract. The insanity of a partner is a ground for the dissolution of a partnership, because it is immediate incapacity, but it may not in the result prove to be a ground of dissolution, for the partner may recover from his malady. When a partner, therefore, is affected with insanity, the continuing partner may, if he think fit, make it a ground of dissolution; but in that case I consider with Lord Kenyon that, in order to make it a ground of dissolution, he must obtain a decree of the court. If he does not apply to the court for a decree of dissolution it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from insanity, so long as he continues the business with that expectation or hope there can be no dissolution." See, also, *Griswold v. Waddington*, 15 Johns. 57; *Bagshaw v. Parker*, 10 Beav. 532; *Sadler v. Lee*, 6 Beav. 324; *Robertson v. Lockie*, 15 Sim. 285; *Pearce v. Chamberlain*, 2 Ves. Sr. 33. No further citation or analysis of authorities will be necessary. The rule supported by the decided weight of authority, and announcing the correct doctrine, is that the insanity of a partner does not, *per se*, work a dissolution of the partnership, but may constitute sufficient grounds to justify a court of equity in decreeing its dissolution.

THE doctrine that one should so use his own property as not to injure the property of others, is well illustrated in the case of *Loveland v. Gardner*, decided by the Supreme Court of California. There, it was held that one who has constructed and maintains a barb wire fence in a negligent manner is liable for injuries occasioned thereby to the domestic animals of others, though the fence is entirely on his own land. The court says:

Of course the liability of the defendant does not depend upon the question whether their fence came up to the legislative standard,—which fixes the liability of owners of trespassing animals in certain

counties,—but the act quoted shows what the legislature of the State considered a good fence. The defendants were not bound to maintain any fence at all, but having undertaken to maintain one, they were bound to see that it was not made a trap for passing animals. It is the duty of the land-owner to take notice of the natural propensity of domestic animals, and to exercise reasonable care to prevent his fence from becoming dangerous. The fact that the fence was constructed entirely upon defendants' land is no defense, if negligently constructed or maintained. The case comes within the rule established by a recent decision of this court in *Malloy v. Savings & Loan Society*, 21 Pac. Rep. 525. In that case the defendant had negligently suffered a privy vault and cess-pool to remain open upon its premises, about ten feet from the sidewalk of a public street in the city of San Francisco, without any inclosure, and plaintiff's minor child, without any fault or negligence on his (plaintiff's) part, had fallen into the same and was drowned therein. The demurrer to the complaint, which stated substantially these facts, was sustained in the court below, and the order reversed here. The decision was based upon the principle that one should so use his own property as not to injure the property of another. Of course, this principle—which is a maxim of common justice, as well as of law—does not create a liability for every injury one may sustain through the use by another of his own property; but where the latter is guilty of a breach of duty which he owes to others in the use of his property, whether by intention or neglect, he is liable for any injury which is occasioned thereby, if the injury is the natural or probable result of the act, and such as a prudent man, under the circumstances, acting with ordinary care, would have foreseen. Under such circumstances, it is no defense that the property is used for a lawful purpose. The following cases illustrate the rule: *Birge v. Gardner*, 19 Conn. 507; *Durham v. Musselman*, 18 Amer. Dec. 133; *Railroad Co. v. Allen*, 22 Kan. 286. The case at bar is similar to *Sisk v. Crump*, 112 Ind. 504, 14 N. E. Rep. 381, where it was held that a barb-wire fence, the strands of which were negligently suffered to sag down and hang loosely from the posts, was not such a fence as a good husbandman would construct or maintain, and that the defendant was liable for injuries occasioned to plaintiff's horse while attempting to pass from the street into defendant's field. See, also, *Powers v. Harlow*, 19 N. W. Rep. 259; *Fink v. Furnace Co.*, 10 Mo. App. 69; *Railroad Co. v. Hudson*, 62 Ga. 680.

A WELL considered case as to the measure of damages for negligence in the transmission of a telegram, is *Pepper v. Western Union Telegraph Company*, decided by the Supreme Court of Tennessee. There, it was held that the sender of a telegram does not constitute the company his agent, and is not bound to the receiver by the terms of the message as negligently altered by the company. The court says:

This brings us to the consideration of the third and serious ground of defense,—the measure of damages in this particular case. The contention of the counsel for complainants is—and such was the view of the learned chancellor—that the company was the agent of the complainants as the sender of the telegram,

and that the complainants were therefore bound to let Bugg & Co., have the goods at \$6.30, the price erroneously named in the dispatch as delivered; and that the loss must be measured by the difference between the price at which they were willing and expected to sell and the price which in consequence of the error of such agent they were compelled to sell. In our opinion this contention cannot be maintained, either upon principle or authority. The minds of the party who sends a message in certain words and the party who receives the message in entirely different words have never met. Neither can therefore be bound the one to the other, unless the mere fact of employment of the telegraph company, as the instrument of communication, makes the latter the agent of the sender. Upon what principle can it be said such an agency arises? The telegraph company is in no sense a private agent. It is clothed by the State with certain privileges; it is allowed to exercise the right of eminent domain. In exchange for such franchise it is operated with certain duties, one of which is the obligation to accept, and transmit over its wires, all messages delivered to it for that purpose. The parties who resort to this instrumentality have no other means of obtaining the benefits of rapid communication, which is the price of its existence. They have no opportunity and no power to supervise or direct the manner or means which the company use in the discharge of their duties to the public in the transmission of messages for particular individuals. They can only deliver to the company a legible copy of what they wish communicated, with no expectation that such paper is to be carried to the party addressed; and their connection with the company there and then ceases. They have contracted with the company to transmit the words of the message to the party addressed, through its own agent, and with its own means. The party receiving the message knows that he is not obtaining any communication direct from the sender, but that he is receiving what the company has taken, and changed the form of, from the paper on which it was written, transmitted by electricity over the wires of the company, and reduced to writing at its destination by an agent of the company; and that it only represents what was written by the sender, in the event that there has been no imperfection in the mechanism of the company, nor negligence in the servants of the company. Knowing the scope of the employment and the methods of transmission, the receiver should be held to know that the sender is bound by the contents of the telegram as received only so far as it is a faithful reproduction of what it sent. He knows, furthermore, that if he acts on the telegram, and it should turn out to have been altered by the negligence or wrongful act of the company, the latter is liable to him for such injury as he may sustain thereby. Ordinarily there is no relation of master and servant between the sender of the telegram and the company. Where this relationship does not exist the principal is not responsible for the torts of the agent, and the negligent delivery of an altered message, when acted on by the receiver to his detriment, is a tort for which the telegraph company alone is responsible. The company retaining exclusive control of the manner of performance, and of its own employees and instrumentalities, the sender of the message being absolutely without voice in the matter, it seems to us that the position of the company to its employer is that of "independent contractor," as defined and understood in the well settled class of cases where the employer is held to be not responsible for the negligence of the contractor in the performance of his work or undertaking. The many and

marked differences between the employment of such companies to transmit a dispatch and the employment of a private person to deliver a verbal message, are so manifest that we cannot assume the liability of the sender in the first instance, from his conceded liability in the last for the negligence of the instrumentality employed. Such a holding not only does violence to well settled principles of the law of agency, but may lead to the absolute ruin of the party employing this useful, and now necessary, public medium of rapid transmission of intelligence; so that every consideration of public policy would seem to point to a different result, unless the courts find themselves constrained by the great weight of authority to uphold the contention here made. How are the authorities? In England and in Scotland the idea of agency in the company, so as to bind the sender upon a telegram negligently changed in the transmission, is repudiated. *Henkle v. Pape*, L. R. 6 Exch. 7; *Verdin v. Robertson*, 10 Ct. Sess. Cas. (3d Series) 35. Mr. Gray in his work on Communication by Telegraphy, while stating the law to be in England and Scotland as above, says that in this country the rule is in general otherwise, citing a number of cases in note 3, section 104. It is to be noticed, however, that this author, after making the statement above given, throws the weight of his learning and research against what he says is the tendency of the American courts, and in an instructive discussion of the question seems to demonstrate that the English rule is the correct one. It is also worthy of remark that in the note already referred to he follows the citation of the cases which are said to make the American rule with the statement that "as a matter of fact it has been decided in a single instance only (*Telegraph Co. v. Shotton*, 71 Ga. 760) that the receiver of an altered message is entitled to hold the sender responsible upon its terms;" adding "that the principle which would allow him to do so, however, has been considered in the other cases." Let us see what may be briefly said of the other cases. \* \* \* We have devoted more time and space to these cases than might appear to be necessary, but, as they are summed up in the note referred to by Mr. Gray as the cases that are regarded as making what is called the rule in America, it was deemed not out of place to ascertain what they were. We make and have no criticism upon what these cases do decide; we merely say that they are not authority upon which to predicate the claim that the courts in this country have established or settled the question under consideration. As already stated, Mr. Gray not only shows that upon principle the English holding is the correct one, but, while listing the cases above mentioned as indicating a contrary view, he states that most of them are *dicta*. There is but one case referred to by him—and the industry and learning of counsel have produced no other—which directly adjudges that the sender of a telegram is bound to the receiver by the terms of the message as negligently altered by the company. That is the case of *Telegraph Co. v. Shotton*, 71 Ga. 760. With very great respect for the high character of that learned tribunal, we cannot approve the line of reasoning pursued, nor the conclusion therein reached.

A QUESTION of insurance came before the Supreme Court of Alabama in *Central City Insurance Co. v. Oates*, where it was held that the condition in a policy of insurance that the insured must render sworn proof of

loss as soon as possible after giving notice of loss is a material part of the contract, and a compliance therewith is a prerequisite to the right of recovery by the assured, unless such proof is waived by the insurer, and that mere silence of the insurer, after receiving notice of loss, cannot be construed as a waiver of the presentation of such proof. The court says:

It has been held, by this and other courts, that where preliminary proofs of loss are presented to the insurer in due time, and they are defective in any particular, these defects may be waived in either of two modes: (1) By a failure of the insurer to object to them on any ground within a reasonable time after receipt—in other words, by undue length of silence after presentation; or (2) by putting their refusal to pay on any other specified ground than such defect of proof. The reason is that fair dealing entitles the assured to be apprised of such defect, so that he may have an opportunity to remedy it before it is too late. *Insurance Co. v. Felrath*, 77 Ala. 194; *Insurance Co. v. Crandall*, 33 Ala. 9; *Insurance Co. v. McDowell*, 50 Ill. 120; *Insurance Co. v. Kyle*, *infra*; *Insurance Co. v. Allen*, 80 Ala. 571, 1 South. Rep. 202. So, there are cases decided by this and other courts which hold, and properly so, we think, that an entire failure to make any formal proof of loss may sometimes be excused on the principle of waiver or estoppel *in pais*. In *Martin v. Insurance Co.*, 20 Pick. 389, no evidence was offered of any preliminary proofs before bringing the action, but only of an abandonment not accepted, and a demand of payment of the loss. The insurer refused to pay the loss solely on account of the unseaworthiness of the vessel, and in all their communications with the plaintiff made no objection to the want of proof. The court held that the refusal to pay on the ground specified was a fact from which the jury were authorized to infer a waiver of the proof of loss. On like principle, a waiver of preliminary proofs has been inferred from a distinct refusal of the company to pay because the assured had taken other insurance without notice, and "had in other ways acted unfairly." *Insurance Co. v. Neve*, 2 McMul. 237. And again, on the ground that no valid contract of insurance had ever been entered into because incomplete at the time of the loss, no objection being made to the want of such proofs. *Taylor v. Insurance Co.*, 9 How. 390; *Insurance Co. v. Adler*, 71 Ala. 518. So, where the insurance company subjected the assured to a personal examination under oath, which statement he subscribed as required by the terms of the policy, and no demand was made for formal proofs, it was held that, upon this state of facts, the jury were authorized to find a waiver of such proofs. *Badger v. Insurance Co.*, 49 Wis. 400. The payment by the insurer of a part of the sum agreed to be paid by the policy in case of loss has also been held a waiver of the usual preliminary proofs. *Westlake v. Insurance Co.*, 14 Barb. 206. So, the offer to pay a specified sum, accompanied by a denial of liability for some of the articles as not covered by the policy, without demand of such proofs. *Insurance Co. v. Allen*, 80 Ala. 571, 1 South. Rep. 202. We can find no case, however, where the mere silence of the insurer has been construed as a waiver of the presentation of preliminary proofs by the insured, where no such proofs, defective or otherwise, have been presented. The policy itself is the most solemn

notification possible of the imperative prerequisite of furnishing such proofs. It is there stipulated that they must be furnished as soon as possible after the fire, and this stipulation is a standing notice of the requirement. It stands to reason that this notice need not be reiterated by the insurer, nor any special attention of the assured called to it, unless the particular circumstances of the case render it necessary to fair and honest dealing between the parties. And the authorities accordingly hold that the mere silence of the underwriter or insurer, or his failure to specify the non-production of such preliminary proofs, as an objection to the payment of the loss, is not sufficient evidence to justify a jury in inferring a waiver of their production. *Insurance Co. v. Lawrence*, 2 Pet. 25; *O'Reilly v. Insurance Co.*, 60 N. Y. 169; *Keenan v. Insurance Co.*, 12 Iowa, 126. A like principle was applied in *Insurance Co. v. Kyle*, 11 Mo. 278, where there was a failure on the part of the insurer to object to a notice of loss when it was received to late. It was suggested by the court that it was not the duty of the company to make any formal objection to the want of notice, and whether they were silent, or made objections on this ground, could not alter the rights of the parties. "Such a doctrine would be in fact," it was said, "implying a new contract between the parties from the mere inaction or silence of one party." See, also, *Patrick v. Insurance Co.*, 43 N. H. 621.

THE Supreme Court of Arkansas in *St. Louis, I. M. & S. Ry. Co. v. Grafton*, holds that deputy sheriffs engaged during a railroad strike in protecting railroad property, are not entitled to a reward offered by the railroad company for the arrest and conviction of persons interfering with railroad property in that county. They say:

Without going into the evidence in detail, or discussing the instructions of the court below, we think that the evidence in the case shows that the appellees were at the time of the arrests of the men, for the arrest and conviction of whom they claim the rewards offered by appellant, acting as a part of the *posse comitatus* of the sheriff of Miller county, called out to aid him in preserving the peace, and in preventing the interference with the railroad tracks, engines, trains, etc., in Miller county, and that they cannot be heard to say that in making the arrests they ignored the sheriff, and acted as private individuals. The policy of the law forbids a public officer, or those called to aid him in the discharge of a public duty, receiving any reward or compensation for their services outside of that allowed by law. The plaintiffs were assisting the sheriff's deputies, and in fact some of the plaintiffs were his regular deputies, in making these arrests, and they were paid for their services as a sheriff's posse by Miller county. Public policy and the laws forbid that they receive other reward for the same. "The rewards of officers are established by law. Their services are to be performed for these legal rewards, and other private rewards for acts which are required from them as public duties by the laws of their country, and the obligations of their stations, must be regarded as corrupt and illegal exactions." *Weaver v. Whitney*, 1 Hopk. Ch. 13. A promise of a reward for performing a duty is illegal, and without consideration. *Pool v. City of Boston*, 5 Cush. 220; *Stotesbury v. Smith*, 2 Burrows, 924. "It is against public policy to allow a man to recover a reward for doing his duty

as a public officer." *Davies v. Burns*, 5 Allen, 352; *Kick v. Merry*, 23 Mo. 74; *Means v. Hendershott*, 24 Iowa, 79; *Pille v. City of New Orleans*, 19 La. Ann. 275. "It is undoubtedly a sound rule of law that a public officer shall not be allowed to receive for performing an official duty any other compensation or reward than that which is permitted by law. The statute makes it the duty of a sheriff to 'keep and preserve the peace in his county, for which purpose he is empowered to call to his aid such persons or power of his county as he deems necessary. He shall also pursue and apprehend all felons, execute all warrants, writs, and other process,'" and, whether a sheriff arrest a person under a warrant, or \* \* \* he acts in his official capacity, \* \* \* for making an arrest in such case the sheriff is entitled to the same compensation as for making an arrest under a warrant," and the conclusion is, if the arrest is made by the sheriff or his deputies, he or they were but doing their duty, and are not entitled to a reward. *Warner v. Grace*, 14 Minn. 489 (Gil. 308); *Austin v. Supervisors*, 24 Wis. 279; *Preston v. Bacon*, 4 Conn. 479; *Smith v. Smith*, 1 Bailey, 71; *Smith v. Whildin*, 10 Pa. St. 40; *Ring v. Devlin*, 32 N. W. Rep. 121.

#### LIMITING LIABILITY OF EXPRESS COMPANIES.

The importance of those modern agencies of transportation which take the form of express companies, lends special interest to the consideration of attempts on their part to restrict their liability. The subject is, however, difficult of exhaustive treatment without branching into the law of common carriers. Nor will the limited space which can be devoted to this topic, permit more than a survey embodying the gist of the decisions.

*Right to Limit the Liability.*—An express company may, in accordance with the great current of authorities concerning common carriers, limit by contract its extreme common law liability as an insurer, by stipulations in a bill of lading, or similar document, against responsibility for loss or damage arising from particular causes, such as the dangers of river navigation, steam, etc., and not due to the fraud or gross negligence of the company or its servants,<sup>1</sup> or similarly limit its liability as to the value of the property,<sup>2</sup> or by regulations as to the manner of delivery and entry of packages, information

<sup>1</sup> *Adams Express Co. v. Fendrick*, 38 Ind. 150, 152. As to limitation of liability against damages incident to a time of war, see *Oiwell v. Adams Express Co.*, 1 Cent. L. J. 186.

<sup>2</sup> See *Brehme v. Adams Express Co.*, 25 Md. 325, 335; *Oppenheimer v. U. S. Express Co.*, 69 Ill. 62, 66. *Contra*: *Southern Express Co. v. Armstead*, 50 Ala. 350, 351, 352.

of their contents, etc.<sup>3</sup> But it has recently been held that where an express company made no inquiries of the sender as to the value of the article shipped, and it was lost by the company's negligence, the fact that the sender inserted in the printed form of receipt the name of the consignee and place of delivery, did not estop such sender from recovering the full value of the article, though the receipt contained a stipulation limiting the company's liability.<sup>4</sup>

*Proof of Limitation of Liability.*—The liability of express companies as common carriers being peculiarly stringent, they will not be permitted to limit that liability by special contracts, which are not bindingly made and mutually understood. And the intrinsic fact that the shipper's agent did not sign the indorsement accepting the conditions in a printed receipt, whereby the express company's liability was limited to a certain sum, would alone be sufficient, in all such cases, to negative the presumption that the special agreement was ever constituted an enforceable obligation.<sup>5</sup> But in the absence of any allegation calling in question the fairness and binding force of the contract, it must be regarded as obligatory, as was held in a case where it confined the responsibility of the express company to fraud or gross negligence.<sup>6</sup> And though the express company must prove that a special contract was made

<sup>3</sup> *Kallman v. United States Express Co.*, 3 Kan. 205, 208, 209. See also *Boorman v. American Express Co.*, 21 Wis. 152, 159; *Christenson v. American Express Co.*, 15 Minn. 270, 281; s. c., 2 Am. Rep. 122. As to limitation of recoverable value, see further *Kirby v. Adams Express Co.*, 2 Mo. App. 369, 374; *United States Express Co. v. Backman*, 28 Ohio St. 144, 154; *Southern Express Co. v. Crook*, 44 Ala. 468; s. c., 4 Am. Rep. 140; *Orndorff v. Adams Express Co.*, 3 Bush, 194, 195. As to need of assent to limitation, not necessarily presumed from acceptance of bill of lading, see *Adams Express Co. v. Stettauer*, 61 Ill. 184, 186; s. c., 14 Am. Rep. 57. And as to effect of assent see *United States Express Co. v. Haines*, 67 Ill. 137, 140. As to bringing home knowledge of restriction, see *Southern Express Co. v. Newby*, 36 Ga. 635; s. c., 91 Am. Dec. 783, 785; *Kallman v. United States Express Co.*, 3 Kan. 205, 210, 211. Concerning common carriers' limitation of liability in general, see *McFadden v. Pac. Ry. Co.*, 92 Mo. 343; s. c., 1 Am. St. Rep. 721, and note leading to the important cases and their discussion, 728.

<sup>4</sup> *Adams Express Co. v. Hoeing*, 11 S. W. Rep. (Ky.) 205; as noted, 28 Cent. L. J. 467.

<sup>5</sup> *Adams Express Co. v. Nock*, 2 Duv. 562; s. c., 87 Am. Dec. 510, 511, 512. For instance of want of proof of assent to restrictions, see *Buckland v. Adams Express Co.*, 97 Mass. 124, 132.

<sup>6</sup> *Adams Express Co. v. Loeb*, 7 Bush, 499, 501.

under circumstances indicating fairness and good faith, yet it is then incumbent on the shipper to show that the contract ought not to be enforced against him on account of duress, imposition or delusion.<sup>7</sup>

*For Negligence.*—The doctrine that an express company may not limit its liability for loss of goods by its own negligence, has recently been affirmed by the Supreme Court of Pennsylvania,<sup>8</sup> upon the ground of its establishment in that State, as a uniform rule, in regard to common carriers in general,<sup>9</sup> and despite a counter ruling of the Supreme Court of the United States.<sup>10</sup> It was admitted, however, that the authorities upon the general subject are very numerous and conflicting. The same doctrine has been upheld as to express companies in the District of Columbia,<sup>11</sup> Alabama,<sup>12</sup> Illinois,<sup>13</sup> Kansas,<sup>14</sup> Kentucky<sup>15</sup> and Missouri,<sup>16</sup> and may well be regarded as the prevailing doctrine. The counter cases will be found reviewed and discussed in those cited.

*For Negligence of Transporting Agent.*—1. The relation of an express company to other transporting agencies, is a subject which leads far into the field of the law of common carriers, and involves a consideration of different views. It is sufficient to here note that an express company choosing a railroad company to do its business, will be chargeable, according to one view, to the same extent for the negligence of the agent employed as if the contract was primarily with such agent, on the well-recognized principle that for culpable defects in carriages used by com-

<sup>7</sup> *Adams Express Co. v. Guthrie*, 9 Bush, 78, 80. For instance of insufficient evidence to raise question of power to restrict liability, see *Southern Express Co. v. Womack*, 1 Heish, 256, 265.

<sup>8</sup> *Grogan v. Adams Express Co.*, 114 Pa. St. 523; s. c., 60 Am. Rep. 360; s. c., 30 Am. & Eng. R. R. Cas. 9.

<sup>9</sup> See *Farnham v. Camden & Amboy R. R. Co.*, 55 Pa. St. 53; *American Express Co. v. Sands*, 55 Pa. St. 140.

<sup>10</sup> *Hart v. Penn. R. Co.*, 112 U. S. 331; s. c., 18 Am. & Eng. R. R. Cas. 604. But see statement of different view in abstract in 28 Cent. L. J. 414, of *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 9 S. C. Rep. 469.

<sup>11</sup> *Galt v. Adams Express Co.*, *McArthur & M.* 124; s. c., 43 Am. Rep. 742, 747.

<sup>12</sup> *Southern Express Co. v. Cook*, 44 Ala. 468, 477; s. c., 4 Am. Rep. 140.

<sup>13</sup> *Adams Express Co. v. Stettauers*, 61 Ill. 184, 187; s. c., 14 Am. Rep. 57.

<sup>14</sup> See *Kallman v. United States Express Co.*, 3 Kan. 205, 208, 210.

<sup>15</sup> *Orndorff v. Southern Express Co.*, 3 Bush, 194, 196.

<sup>16</sup> *Ketchum v. American Merchants Union Express Co.*, 52 Mo. 390, 396, discussing burden of proof.

mon carriers the law makes the carrier responsible.<sup>17</sup> And the express company will be liable for the full value of goods if the loss was owing to negligence on the part of the railroad company, even though the conditions in a receipt limiting liability to a certain sum were understandingly assented to by the shippers, and became a binding contract between the parties.<sup>18</sup>

*For Negligence of Transporting Agent.*—2. According to another view, the receipt of an express company for goods intrusted to it for transportation for hire, and which restricts the liability of the company, will not be construed as exempting the company from liability for loss occasioned by negligence in the agencies it employs, unless the intention to thus exonerate the company is expressed in plain and unequivocal terms.<sup>19</sup>

*Limiting Time to Present Claim.*—The requirement that the limitation of liability by an express company or other common carrier must be reasonable, has been recently applied to a stipulation in the contract of shipment, providing for freedom of the express company from liability for any claim not presented within sixty days from the date of the contract, and this restriction was held unreasonable because it had no reference to the time of loss.<sup>20</sup> But even if a restriction of this character be reasonable, a literal compliance therewith cannot be exacted, according to a recent decision, so as to exclude evi-

<sup>17</sup> *Boscowitz v. Adams Express Co.*, 93 Ill. 523; s. c., 34 Am. Rep. 191, 197.

<sup>18</sup> *Boscowitz v. Adams Express Co.*, 93 Ill. 523; s. c., 34 Am. Rep. 191, 197.

<sup>19</sup> *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11; s. c., 85 Am. Dec. 211, 218. As to effect of contract expressly limiting liability of express company to that of forwarders, see *Reed v. United States Express Co.*, 48 N. Y. 462, 466. See also *Snider v. Adams Express Co.*, 63 Mo. 376, 378; *Gibson v. American Merchants Union Express Co.*, 3 Thomp. & C. 501, 502, 503; *Pendergast v. Adams Express Co.*, 101 Mass. 120, 123; *American Express Co. v. Second Nat. Bank*, 69 Pa. St. 394, 401, 402. A limitation of value is held not available for a connecting express company, in *Martin v. American Express Co.*, 19 Wis. 336, 342. "As to contract not insuring to benefit of intermediate carrier, see *Adams Express Co. v. Harris*, 29 Cent. L. J. (Ind.) 24."

<sup>20</sup> *Pacific Express Co. v. Darnell*, 6 S. W. Rep. (Tex.) 765. For construction of such a clause as in the nature of a statute of limitations rather than a condition precedent, see *Westcott v. Fargo*, 61 N. Y. 542, 551. But compare *Porter v. Southern Express Co.*, 4 S. C. 135, 143; *Southern Express Co. v. Hunnicutt*, 54 Miss. 566, 568, 569; s. c., 28 Am. Rep. 383. Concerning stipulation as to mode of making claim, see *United States Express Co. v. Harris*, 51 Ind. 127, 129.

dence tending to excuse delay in making the claim, where it was made as soon after discovery of the loss as was reasonably possible.<sup>21</sup>

<sup>21</sup> *Glenn v. Southern Express Co.*, 86 Tenn. 504; 8 S. W. Rep. 152. A condition in a receipt given to a shipper by the express company for property delivered to it for shipment, to the effect that the company would not be liable for any loss or damage unless claim therefor was presented within a certain time from the date of the receipt, was very recently held not binding on the shipper, as the latter had not signed the receipt. *Hartwell v. Northern Pacific Express Co.*, 41 N. W. Rep. (Dak.) 732, as noted in 28 Cent. L. J. 407.

#### CORPORATIONS — LIABILITY OF STOCK-HOLDERS.

##### HARPOLD V. STOBART.

*Supreme Court of Ohio, April 23, 1889.*

1. A stockholder, who causes an entry of a transfer of his stock to be made by the secretary of the company in a book then present in the secretary's office, with the expectation that the secretary will cause the entry to be made in the proper book then at the latter's house, is not relieved thereby from liability as a stockholder to the creditors of the company, though the sale was made in good faith and for value, and the company afterwards treated the purchaser as the owner of the stock.

2. A stockholder, who sells and transfers his stock to one, who afterwards becomes insolvent, is liable to the creditors of the corporation for such portion of the debts remaining unpaid, which existed while he held his stock, not in excess of the amount of such stock as will be equal to the proportion, which his said stock bears to the entire capital stock held by solvent stockholders within the jurisdiction, who are liable on the same debts.

This proceeding in error is brought by Peter Harpold, W. A. Roberts, Daniel Bibbe, the executors of Moses E. Sayre, and John A. Williamson, to reverse judgments rendered against them in the circuit court of Meigs county. The action below was brought by creditors of the Riverside Salt Company, a corporation organized under the laws of Ohio, which had become insolvent, and a large number of persons, including plaintiffs in error, as stockholders, for the purpose of enforcing the statutory liability against them in favor of the creditors. Several of the defendants were not stockholders when the corporation became insolvent, but had been such at dates anterior thereto, and were charged as liable because they had assigned to persons who were insolvent. W. A. Roberts was a creditor of the company, and for a time a stockholder. He sold and transferred his stock, May 29, 1875, to R. R. Hudson. The case was tried in the common pleas, and appealed to the circuit court, by the plaintiffs in error, save Roberts, who did not appeal. In that court judgments

were rendered against the plaintiffs in error, a reversal of which is sought by this proceeding. Upon the judgment rendered against Roberts in the common pleas he paid the sum of \$400. Further facts necessary to an understanding of the points decided appear in the opinion. W. A. Roberts' special claim is that the judgment of the circuit court is erroneous, because the case, as to him, was not appealed to that court. Peter Harpold's special claim is that he had sold and transferred his stock to plaintiff in error Roberts, and that the circuit court erred in holding him as a stockholder. The further claim of these parties and the claim of the remaining plaintiffs in error is that, as to each, the judgment rendered is excessive.

SPEAR, J., delivered the opinion of the court:

1. Did the circuit court err in its judgment against Peter Harpold? The controversy arises as to 30 shares of stock, which, on May 12, 1873, he sold in good faith and for value to W. A. Roberts: and he claims that, as to these, he should be held only as a guarantor for Roberts, and that such liability should be confined to a proportional liability for debts existing at the time of the sale. The sale was admitted, but it was claimed by the creditors that there was no transfer of the stock on the books of the company, and hence that Harpold continued liable to creditors as though he had owned the stock at the commencement of the action. The findings of the circuit court show that the transfer stock-book of the company was Journal A; that no transfer of this stock was made on that book, though a transfer was, at the time of the sale, entered by the secretary in a small book present in the office of the company, and it was then understood that the secretary would make the transfer in another book at his house. The president and directors of the company were present, and knew of the transaction. Harpold was a director at the time, and he did all he supposed necessary to effect the transfer, and the corporation thereafter treated Roberts as the owner of the stock. Two years later there was an entry on Journal A of the transfer of 80 shares from Roberts to one R. R. Hudson, which included the 30 shares purchased by Roberts from Harpold. At the time of the trial Harpold still appeared, by Ledger A and Journal A, to be the owner of 30 shares of stock. The creditors have the right to resort to and rely upon the proper book of the company as showing who the stockholders are, and the amount of stock held by each, and they are presumed to have relied upon the record so found in this case. While it is not necessary that a book of any special kind be adopted for that purpose, yet, when one is selected and used, that becomes the stock-book, and transfers, to be valid, must be made upon that. The object to be accomplished by the keeping of such a book requires reasonable certainty as to its identity. Where the book so selected and used by the company shows that the party is the owner of shares of stock, he is estopped, as between himself and creditors, to

contradict the record, provided the entry was placed in the stock-book originally by his consent. And, where the name of an actual stockholder appears upon that book as owning a given number of shares, the entry is presumed to have been made with his consent; at least, this is so where it was correct when made, and, as between him and creditors of the corporation, he is estopped to contradict the record, or deny ownership of the shares. Rev. St. § 3259; Low. Tr. Stocks, §§ 82, 107, 191, 203; Thomp. Liab. Stockh. § 217; *Ex parte Brown*, 19 Beav. 97; *Stanley v. Stanley*, 26 Me. 191. The circuit court treated Harpold as the owner of these shares, as between him and creditors, and this, we think, was correct; but, as between Harpold and Roberts, the former was entitled to a judgment against the latter.

2. The finding as to Daniel Bibbe presents the facts upon which may be determined the further question in the case. He was the owner of 20 shares of stock, the par value of which was \$2,000. On the 31st day of May, 1875, he sold this stock, in good faith and for value, to one R. R. Hudson, and the same was on that day transferred to the latter on the books of the company. The company continued to do business until the year 1878, when it failed, many new debts having accrued in the meantime. Hudson became insolvent, and was so at the time the case was tried. At that time the liabilities of the corporation reached \$43,791.05,—a sum in excess of the face value of all the stock held by solvent stockholders, as well as those who had assigned their stock as those who were holders at the commencement of the suit. During the life of the corporation frequent changes occurred in the ownership of portions of the stock, and debts against the corporation accrued at various times during that period. In its decree the court divided the indebtedness into series, and made assessments upon stockholders to meet each class of debts, with a finding as to what stockholders were solvent, and the amount of stock held by each at the date fixed for each assessment, rendering judgments accordingly. Those who owned stock at the commencement of the action, and were solvent, were assessed the full amount of their statutory liability, and that liability was thus exhausted. By this finding it appears that between July 11, 1873, and January 1, 1875, there existed debts still unpaid to the amount of \$4,152.50, upon which assessment was made against Bibbe of \$519.25. Between June 15, 1870, and July 11, 1873, there existed debts still unpaid to the amount of \$13,148, upon which he was assessed \$1,391; and prior to June 15, 1870, there existed debts to the amount of \$926.90, upon which he was assessed \$80,—the whole amounting to a sum practically equal to the amount of his stock. In making these assessments the court commenced with the class of stockholders who held stock at the date of the failure of the company, and assessed each solvent stockholder to the full amount of his liability in respect of all the debts then due from the corpo-

ration. The amount so procured not proving sufficient to pay the obligations, the court then, proceeding to the class last in order of assignment of stock, assessed the solvent assignors of the present insolvent stockholders in the amount of their liability in respect of the debts contracted prior to the transfer of their stock to their insolvent assignees, and so proceeded until all liability on stock was exhausted. The effect of this rule, as to each solvent assignor of stock to an insolvent assignee, was to make him liable, not simply to a proportionate amount of the indebtedness which existed while he was a stockholder equal to the ratio which his proportion of the capital stock bore to the entire stock held by solvent stockholders, but to an amount equal to the full amount of his stock. It is claimed for Bibbe that he should have been assessed but \$956.64, in all, and that the court erred in omitting to include in the class of stockholders who were liable with him those who were holders of stock when the suit was commenced, but who, by the decree, were left out because their liability had already been exhausted. This claim presents the question to be determined, which is, is this party to be assessed in a class which includes only those who were stockholders at the time he was such, and are solvent, or should such class include also those who continued to be stockholders, and so became liable in respect of after accruing debts?

We first inquire what liability was created? What right of contribution, if any, attended it? Is the liability which may be enforced to be measured by the extent of liability as of the time it attached, or may it be enlarged by reason of a change in the condition of the corporation brought about by after accruing debts? And is the right of contribution to be impaired by reason of like causes? We are not materially aided in making answer, either by text-books, or by decisions of courts outside our own. The constitutional provision is: "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." And the statute is: "All stockholders \* \* \* shall be deemed and held liable, to an amount equal to their stock subscribed, in addition to said stock, for the purpose of securing creditors of such company." It will be noted that neither provision gives a rule for determining who are stockholders, nor for ascertaining whether or not all may be treated as stockholders for some purposes, and not for others. But such questions are left for determination by the courts in giving construction to the statute, as cases may arise. In construing these provisions, the holdings in this State are to the effect that the individual liability of stockholders attaches in favor of creditors at the time the debt is contracted or the liability incurred by the corporation, and that

such liability is not discharged by the subsequent assignment or transfer of the stock, but the successive assignees impliedly undertake to indemnify or discharge the assignor from the liability which attached to him while he held the stock. This right against the stockholders is intended for the common and equal benefit of all the creditors. As between the stockholders and creditors, each stockholder is liable severally to all the creditors, but, as between stockholders, there is a proportional liability by all stockholders and right of contribution which grows out of the organic relation existing between them, and, as between them, each stockholder is bound to pay in proportion to his stock. The liability is not a primary fund or resource for the payment of the debts of the company, but is collateral to the principal obligation which rests on the corporation, and is to be resorted to only in case of the insolvency of the corporation, or where payment cannot be enforced by ordinary process. *Wright v. McCormack*, 17 Ohio St. 86; *Umsted v. Buskirk*, *Id.* 113; *Brown v. Hitchcock*, 36 Ohio St. 667; *Wheeler v. Faurot*, 37, Ohio St. 26; *Bullock v. Kilgour*, 39 Ohio St. 543; *Mason v. Alexander*, 44 Ohio St. 318, 7 N. E. Rep. 435.

Of the foregoing there should be emphasized three important conclusions bearing upon the question under consideration, viz.: (1) The liability of the stockholder is collateral to that of the principal debtor, the corporation; (2) this liability attaches at the time the debt against the corporation is created or liability incurred; and (3) each stockholder sought to be so made liable has, in order that his liability may be confined to his just proportion, the right to insist that all stockholders within the jurisdiction and solvent, who stand in the same relation to the debts with himself, shall be brought in, and be held to their proportional liability in common with him. When it has been determined that the liability of the stockholder is collateral, and not original, his right to ask for a marshaling of other like securities arises. So, too, when it has been determined that the liability as to debts arises at the time they are incurred, it clearly follows that such liability is confined to debts which existed during the time the stock is owned. It follows, with equal certainty, that no mode of assessment should be adopted which enlarges the liability of the stockholder in the case we are considering, so as to make him liable, directly or indirectly, for debts contracted by the corporation after he has ceased to be a stockholder; and, when it has been ascertained that he has the right of contribution as between himself and his fellow-stockholders who stand in the same relation with himself to the debts he is sought to be held for, it follows, with like certainty, that no rule of assessment which curtails that right is equitable or just. This liability has already attached, and it is in respect of debts existing at the time he assigns, and for nothing else. His right of contribution against his fellow-stockholders, to require them to re-

spond to their proportional share of the same burden, is enforceable in the same action, and this right is not inferior to that of the creditor to enforce his claim. They go together. It is equally plain that if any of the stockholders who are alike liable with him are assessed so that their liability is exhausted in the payment, in whole or in part, of debts created after he has assigned his stock, then he is indirectly made to respond to debts of that character, and his right to insist upon proportionate contribution is, in like manner, impaired. As we have already found, he is, in a sense, a surety for the corporation; that is, his liability is secondary, and not primary. Resort must first be had to the corporation before he can be held. In *Michigan*, under a statute not dissimilar to ours as construed in *Wright v. McCormack*, *supra*, the supreme court (*Hanson v. Donkerley*, 37 Mich. 184) held a stockholder to be a surety, and that his liability is discharged by the extension of time by the creditor, and there are other authorities to the same effect. Whether or not the law, in Ohio, goes to that length we need not inquire. It is enough to know that his obligation is collateral and secondary, and that he has the right to call upon his co-stockholders to bear their proportion of the common liability. Is it equitable to impair that right? True, the liability created by statute is for the benefit of creditors, but it does not follow that the creditor's interest is the only one the court should guard. All laws for the collection of debts are in the interest of creditors, but the duty of giving to the creditor the full benefit of such statutes does not warrant forgetfulness of the rights of the debtor; and in this case no reason exists for enforcing the right of the creditor given by the statute, and at the same time ignoring the limitation placed upon that right by the construction of this court given to the statute. After the stockholder ceases to be such, he has no voice in the management of the corporation, and no share in the profits that may thereafter be made. The creditor continues, or may continue, to deal with the corporation, and, in doing so, may delay indefinitely the collection of his debt, even if he may not, by a new contract, extend its payment, without consent or knowledge on the part of the stockholder who had assigned, and thus continue a contingent liability against the latter which is powerless to terminate. Under such circumstances, it does not seem inequitable to place upon the creditor, rather than upon the former stockholder, the risks incident to such delays as affected by the incurring of new debts. We are of opinion that a stockholder who has, in good faith, sold and assigned his stock to one who becomes insolvent, is liable to creditors of the corporation for such portion only of the debts existing while he held the stock, and remaining due, (not in excess of the amount of stock assigned), as will be equal to the proportion which the capital stock assigned by him bears to the entire capital stock held by solvent stockholders, liable in respect of the same

debts, who are within the jurisdiction, to be ascertained at the time judgment is rendered. In this view the mode of assessment adopted by the circuit court was not an equitable one, and the judgments against the plaintiffs in error Roberts, Williamson, executor of Moses E. Sayre, and Daniel Bibbee should be modified in conformity with the conclusion herein stated. The costs in this court may be taxed, one-half to plaintiffs in error, and one-half to defendant in error.

NOTE.—Till early in this century corporations were not numerous, and but few questions relative thereto had been settled by judicial decision. Since that period they have multiplied enormously, and they now control a great part of the wealth of all civilized countries. A great many new questions have presented themselves, and their solution was not left to the courts, but to a great extent has been controlled by legislative enactment. The legislation of the various States differ so greatly as to the organization of corporations, their powers and liabilities, and the rights and obligations of stockholders, that the solution of nearly all questions relative to corporations is dependent upon local legislation, and but few of the legal adjudications are general in their scope.

*Transfer of Stock.*—Since stock in a corporation is but a chose in action, it was held that it could be transferred like any other chose in action, that an indorsement and delivery of the certificate was sufficient.<sup>1</sup> Laws were passed requiring transfers of stock to be made on the books of the corporation, or the by-laws of the corporation so required. Then it was held, that the transferee obtained only the equitable title by the delivery of the certificate, and the legal title was obtained by a transfer on the books of the corporation.<sup>2</sup> But the question arose, whether a creditor of the vendor of the stock could attach or sell the stock and supersede the vendee thereof who held the certificate, but had not obtained a transfer on the books of the corporation. Where it was held, that the law about transfers was only intended for the protection of the corporation, the vendee, without a recorded transfer on the books, was held to have the better title.<sup>3</sup> Other courts took the view, that such transfers were required in order to protect the public, that no property was intended to be exempt from execution, and that only by the books of the corporation could the ownership of the stock be ascertained. They held, that the ownership of the stock was determined by the books of the corporation, both as to the corporation and the public, though a transfer of the certificate was good as between the parties themselves and determined their responsibility as between themselves.<sup>4</sup> So a party has been held to be a stockholder when he has requested a transfer which the company has refused to make.<sup>5</sup>

<sup>1</sup> 22 Cent. L. J. 270; 23 Cent. L. J. 3.

<sup>2</sup> Johnson v. Ladin, 108 U. S. 500; Boston H. M. Ass. v. Cory, 129 Mass. 435.

<sup>3</sup> Thurber v. Crump, 86 Ky. 408; Crescent City S. & M. Co. v. Deblieux, 3 South. R. 726; Telford, etc. F. T. Co. v. Gerhab, 13 Atl. R. 90; Ross v. Southwestern R. R., 53 Ga. 514.

<sup>4</sup> Adderly v. Storm, 6 Ill. 624; Shellington v. Howland, 53 N. Y. 371; Johnson v. Ladin, *supra*; Helm v. Swiggett, 12 Ind. 194; Topeka M. Co. v. Hale, 39 Kan. 22; New Albany, etc. R. R. v. McCormick, 10 Ind. 499; New York, etc. R. R. v. Schuyler, 34 N. Y. 30; Chouteau S. Co. v. Harris, 20 Mo. 382.

<sup>5</sup> Moore v. Bank, 52 Mo. 379; Mo. Bank v. Richards, 6 Mo. App. 454; Telford & F. T. Co. v. Gerhab, 13 Atl. Rep. 90.

The question is still an open one, but the latter view seems more consonant with the spirit of present legislation.<sup>6</sup>

*Liability of Transferee.*—One who has caused his stock to be transferred to another on the books of the corporation is discharged from subsequent liability, unless the charter otherwise provides.<sup>7</sup> It would seem that he should be discharged from all contingent liability for the debts of the corporation then existing, since another has taken his place and the debts were not contracted on his individual credit. The decision in the principal case may continue his liability for a long time, and the officers of the corporation may use all the assets in discharging the later debts, leaving the old ones unsatisfied. It is a well established rule, that a transfer to a person, then insolvent, will not relieve such stockholder. The decisions are contradictory on this subject.<sup>8</sup> The mode for computing the liability, adopted in the principal case, may involve very extensive calculations, since rests and new proportionments are required with every recorded transfer of stock.

*Enforcing Liability of Stockholders.*—At first it was held that the suit should be brought in equity for the benefit of all the creditors of the insolvent corporation and against all the stockholders.<sup>9</sup> It was then decided, that it was not necessary to sue those parties, who were not within the jurisdiction of the court.<sup>10</sup> Then it was held, that a creditor who had secured a judgment against the corporation, and had exhausted his legal remedies might, in equity, obtain satisfaction out of any fund accessible to him, and need not sue for the benefit of all the creditors nor join all the stockholders,<sup>11</sup> but the party sued may have other stockholders brought in who are within reach of process.<sup>12</sup> The creditor is not required first to sue the corporation when it has disposed of all its assets and is practically dissolved so far as creditors are concerned.<sup>13</sup> The solvent stockholders must pay all the debts, disregarding the insolvent stockholders,<sup>14</sup> and in such suits absence from the State is considered as equivalent to insolvency.<sup>15</sup> Of course no stockholder can be required to pay beyond his legal liability, which, in Ohio, in addition to his stock, is an amount equal to the stock subscribed by him.<sup>16</sup> In many States, however, the mode of enforcing a stockholder's liability for the debts of the corporation is provided for by a special statutory proceeding. It will be seen that in the principal case the stockholder is only liable to a judgment for his proportion, whereas, in many other courts he may be called on to pay more than his due proportion, and then must sue the other stockholders for contribution.

S. S. MERRILL.

<sup>6</sup> 22 Cent. L. J. 270; 23 Cent. L. J. 3.

<sup>7</sup> Allen v. Montgomery R. R., 11 Ala. 437; Isham v. Buckingham, 49 N. Y. 216; Chouteau S. Co. v. Harris, 20 Mo. 382.

<sup>8</sup> 2 Moraw. Corp. (2d ed.) §§ 889, 899 and notes, where authorities are collected.

<sup>9</sup> Thompson Liab. Stockh. §§ 351, 353; Coleman v. White, 14 Wis. 700; 21 Cent. L. J. 92.

<sup>10</sup> Erickson v. Nesmith, 46 N. H. 371; Kennedy v. Gibson, 8 Wall. 498.

<sup>11</sup> Marsh v. Burroughs, 1 Woods C. C. 463; Hatch v. Dana, 101 U. S. 205; Bartlett v. Drew, 87 N. Y. 587; Pierce v. Milwaukee Con. Co., 38 Wis. 253; Ogilvie v. Knox Ins. Co., 23 How. 380; Hickling v. Wilson, 104 Ill. 54.

<sup>12</sup> Hatch v. Dana, *supra*; Brundage v. Monumental S. M. Co., 12 Oreg. 322.

<sup>13</sup> State S. Ass. v. Kellogg, 52 Mo. 533; Hodges v. Silver M. Co., 9 Oreg. 200.

<sup>14</sup> Hodges v. Silver M. Co., *supra*.

<sup>15</sup> Liddell v. Wiswell, 59 Vt. 363.

<sup>16</sup> Laws of Ohio, 1880, § 3238.

## JETSAM AND FLOTSAM.

**PHOTOGRAPHING THE UNITED STATES SUPREME COURT.**—An amusing story is told of a recent photographing of the justices of the Supreme Court of the United States. The artist of the lens had posed the august jurists in their satin robes of the bench and secured his negative. On a bright day soon after he reproduced the life-like similitude of the features and forms of the expounders of the law. Proof copies were sent to each one of the learned group. The sky line of altitude was decidedly erratic and called out Justice Bradley, who made decided objection to the picture. The justices were posed standing. The low tatus of Justice Bradley was in marked contrast with the towering form of Justice Gray at 6ft. 4in. on one side, and the almost equal height of Justice Harlan on the other. The sudden drop gave the picture the appearance of a chasm in the court portrayal and a schism between the distinguished justice from New Jersey and the photographer was the result. The artist made every defense before the member of the bench, but without avail. The justice declared that he looked like a boy beside of his two ponderous and lofty brothers of the bench, and cut the matter short by directing the photographer to destroy the negative and send him the bill for the work done. A hundred dollars, it is said, barely cancelled the objection. The court arranged another photographic dress parade. This time the short justices arbitrated their differences in height by standing upon improvised pedestals of empty lemon boxes convenient at hand. The effect, that is, of equalization of height, the lemon boxes being kept under cover, was satisfactory.

**CHINESE OATHS.**—An interesting ceremony took place in the recent trial of Chinese gamblers in Philadelphia.

Young Bing was called to the stand.

Mr. Boyle asked that the most solemn of Chinese oaths be administered, which was nothing less than the decapitation of a live chicken, and two live shang-hais were brought in. Interpreter Chew spread a strip of muslin in front of the witness stand and prepared a fire in one of the tin cuspidores to burn the rooster's blood. The fire was kindled by means of sticks. Judge Brey warned the audience to be seated, saying that he did not want the witness to be affected by any laughter. Mr. Shapley remarked that before this business was gone through he wanted to know whether this was a solemn oath or merely an incantation. Interpreter Chew said it was binding on their conscience.

"What is the reason for the solemnity of this oath?" he asked.

"They believe that everything has a spirit, good or evil," was the reply. After a Chinaman cuts off a rooster's head he believes that the spirit will trouble him if he tells a lie."

The oath was read by the interpreter to the witness, who repeated it after him. The words are:

"This day I come here as a witness to tell the truth and not to give evidence on one side. My heart must be clean. If I don't tell the truth myself and my whole family will die, and I pronounced it with my own mouth if I tell a lie to help the gambling case, may I die in the distraction of sinking down to a bottomless sea, and my stomach burst open, and no ground to bury my body."

A large knife was handed the witness and the rooster was thrown on the floor, but Bung made a bungling job of it. In his efforts to chop his head off he became so excited that his hand slipped and he slashed Inter-

preter Chew. This was repeated when Chew tried to change the chicken's position. But finally the fowl was killed and the blood burnt in the spittoon. The second chicken shared the same fate and some mysterious signs were made with the dead body. Among the spectators were a number of college professors and the members of the Oriental Club.

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 QUERIES AND ANSWERS.

[Subscribers are invited to send short answers to the following.]

## QUERY No. 4.

The laws of Minnesota provide, regarding libels, that "before any suit shall be brought for the publication of a libel in any newspaper in this State, the aggrieved party shall, at least three days before filing or serving a complaint in such suit, serve notice on the publishers of such newspaper, etc., specifying the statements in the said article which is alleged to be false and defamatory; then, etc., if it shall appear on the trial of said action that said article was published in good faith, etc., and that a full and fair retraction was published in the next regular issue of such paper, etc., then the plaintiff shall recover only actual damages." Just prior to an election the publishers of a newspaper issue a small sheet only ten inches by twelve inches, and printed upon one side, but with regular heading prefixed, with "extra edition of." This extra edition reviewed the several tickets in the field, and incidentally published of and concerning a ward politician the alleged libel, he not being a candidate for office. The regular edition of the said newspaper is of the usual size of six column newspapers. No notice to the publishers to make retraction was given. The question arises, was this little sheet called "extra edition" a newspaper, within the meaning of the statute? W.

## QUERY No. 5.

Are the directors of a newspaper personally liable for a libel published in a paper edited by an editor elected or appointed by them? Are they liable after the continuous publication—libelous in their character and are of the same tenor and effect as the first—the directors having the knowledge of the publications by reading the the same and taking no steps to stop it, which was in their power to do? The libels were on one person always named. Can subsequent publications be read in evidence? If yea, for what? S.

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 QUERIES ANSWERED.

## QUERY No. 2.

[To be found in Vol. 29, Cent. L. J. p. 34.]

It takes merely a life estate, dependent upon the life of W. His life estate could only be enlarged by the operation of the rule in Shelley's case which does not apply to the case stated, and even if it did the rule has been abrogated in Missouri. See R. S. Mo. § 3943, and Tesson v. Newman, 62 Mo. 198.

## QUERY No. 22.

[To be found in Vol. 28, Cent. L. J., p. 506.]

1. The commutation of a homestead entry is only the consummation of the homestead right, and is not an exercise of the pre-emption privilege. The land entered is, therefore, exempt from execution for the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor. James Brittin, 4 Dec. of the Dept. of the Interior relating to Public Lands,

p. 441: *Cotton v. Struther*, 6 *Id.* 288; *Ball v. Graham*, 6 *Id.* 407; *Clark v. Bayley*, 5 *Oreg.* 343; *Seymour v. Sanders*, 3 *Dillon*, 437; *S. C. Lewis, L. C.*, on *Public Land Laws*, 219; *Miller v. Little*, 47 *Cal.* 348; *Gill v. Hallack*, 33 *Wis.* 523; *Patten v. Richmond*, 28 *La. Ann.* 795; *Russell v. Lowth*, 21 *Minn.* 167, 18 *Am. Rep.* 389; *Adams v. White*, 2 *South. Rep.* 774, and *Bouscher v. Smith*, 35 *N. W. Rep.* 681. 2. A sale under execution being in violation of a positive provision of statutory law, there is no room for an estoppel under the facts stated in the query. *Clark v. Bayley*, 5 *Oreg.* 343.

R. M. A. S.

### HUMORS OF THE LAW.

A DISTINGUISHED federal judge, who is said to be somewhat too caustic in his wit, at a complimentary dinner recently given him in a southern city, wishing to produce a laugh at the expense of a prominent lawyer, cut off the ears of a roasted pig and directed a waiter to take them to the lawyer with his compliments. The lawyer, who had long considered himself, as the company well knew, unfortunate with his cases in the judge's court, received the ears gracefully, and directed the servant to say to the judge that he felt specially thankful for the gift, as he had vainly sought for a long time before to get the ear of the court.

AN American judge once reprimanded a lawyer for bringing several small suits into court; remarking that it would have been better for the parties in each case had he persuaded them to submit the matter in controversy to the arbitration of some two or three honest men.

"Please your Honor," retorted the lawyer, "we did not choose to trouble honest men with them."

### WEEKLY DIGEST

OF ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

ALABAMA.....	1, 18, 69
ARIZONA.....	94
ARKANSAS.....	46, 87
CALIFORNIA.....	11, 15, 23, 91, 100, 105, 105
DAKOTA.....	13, 97
GEORGIA.....	19, 89
IDAHO.....	68
ILLINOIS.....	10, 14, 32, 34, 39, 48, 44, 48, 58, 63, 73, 74
INDIANA.....	2, 12, 52, 54, 61, 72, 84
IOWA.....	24, 57, 60, 93
KANSAS.....	85, 86, 51, 55, 65, 96, 67, 75, 76, 81, 90, 96, 98
KENTUCKY.....	101
LOUISIANA.....	5, 9, 83
MASSACHUSETTS.....	37
MICHIGAN.....	21, 29, 30, 33, 53, 64, 86
MINNESOTA.....	16, 31, 78, 92
MISSOURI.....	41
NEBRASKA.....	22, 36, 38, 40, 47, 71, 77, 85, 95, 99
NEW YORK.....	42, 40, 79, 102
OHIO.....	17, 50, 50, 56
PENNSYLVANIA.....	3
TENNESSEE.....	7, 27, 28, 90, 98, 104
TEXAS.....	62, 70
UNITED STATES C. C.....	25, 59
UNITED STATES D. C.....	4, 5, 6, 45, 52

1. ADMINISTRATION.— Under Code Ala. §§ 2124, 2191, 2192, eighteen months are allowed, after administration granted, for presenting bills against the estate, and a settlement cannot sooner be enforced, unless the executor or administrator becomes satisfied that the estate is solvent, and so reports. — *Jackson v. Russell*, Ala., 6 *South. Rep.* 95.

2. ADMINISTRATORS.— A complaint in a suit to annul letters of administration, on the ground that there were no assets belonging to the estate when the administrator was appointed, must aver that fact in positive terms. A complaint alleging that, if there were any, they had been fully administered before defendant received his appointment, is bad.—*Langedale v. Woollen*, Ind., 21 *N. E. Rep.* 541.

3. ADMIRALTY—Collision.— A vessel under steam must keep out of the way of a sailing vessel. — *The Maggie S. Hart v. The Ivanhoe*, (U. S. D. C.) Penn., 38 *Fed. Rep.* 765.

4. ADMIRALTY—Shipping.— A bill of lading is a policy of insurance, guarantying the safety of the goods against all risks except the perils of the sea; and whenever the ship-owner, in claiming exemption from liability for an admitted loss, pleads a peril of the sea, the burden of proof is upon him to make out a *prima facie* case.—*Serrales v. The Charles J. Willard*, (U. S. D. C.) N. J., 38 *Fed. Rep.* 759.

5. ADMIRALTY—Shipping.— A vessel is required to make delivery of cargo within such parts of the port as have become fixed by established usage, if a customary berth can be obtained there within a reasonable time. If the vessel go elsewhere, she must make good the additional expense thereby caused to the consignee.—*Montgomery v. The Port Adelaide*, (U. S. D. C.) N. Y., 38 *Fed. Rep.* 753.

6. ADMIRALTY—Damages.— A boat, while loading, was injured by the swells from a passing steamer. Her loading was completed with a full cargo, and she was then started towards her destination, 125 miles distant, and foundered near the end of the trip: *Held*, that the risk of the trip should not be thrown upon the steamer, but that she was liable only for the injuries occasioned by the swells. — *Cornwall v. The New York*, (U. S. D. C.) N. Y., 38 *Fed. Rep.* 710.

7. ADVERSE POSSESSION.— If a purchaser of land inclose a parcel contiguous to his purchase by mistake, believing that he is putting his fence on the true boundary, and hold such parcel as his own for seven years, such possession is adverse, and will avail against the true owner. — *Erck v. Church*, Tenn., 11 *S. W. Rep.* 794.

8. APPEAL—Exceptions.— When the appellant prays the court to decide the case before it, and not to remand it, this will be treated as a waiver of exceptions to rulings in the court below, the effect of sustaining which would necessitate a remanding.—*Schlatter v. Wilbert*, La., 6 *South. Rep.* 127.

9. APPEAL—Judgment.— A judgment dissolving an attachment is an interlocutory decree, which to be effectually appealed from, need not be signed by the judge.—*Wickham v. Namy*, La., 6 *South. Rep.* 123.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS.— *Held*, under the facts that lien secured by a bank of its debtor was not the result of its superior diligence, but was effected by the active effort of the debtors to give it preference in the assignment then in preparation and for that reason it was void. — *Hanford Oil Co. v. First Nat. Bank*, Ill., 21 *N. E. Rep.* 433.

11. ATTORNEY AND CLIENT.— An attorney at law who drew the declaration of homestead, acting at the time for both husband and wife, is competent to testify, in a contest between the deceased husband's legatee, who claims the property as his testator's separate property, and testator's widow, who claims it as community property, as to whether the recital in the declaration of homestead was explained to the wife, and as to what the explanation was. — *In re Bauer's Estate*, Cal., 21 *Pac. Rep.* 759.

12. ATTORNEY AND CLIENT. — A judgment creditor has no lien on a judgment recovered by his insolvent debtor against a third party, and cannot question the validity of an agreement between his debtor and the attorneys who recovered the last-named judgment, by which the latter were to have a lien on the judgment, not only for their fees, but also for other indebtedness due them from their client. — *Harshman v. Armstrong*, Ind., 21 N. E. Rep. 662.

13. CHATTEL MORTGAGES. — Under Civil Code Dak. § 2024, respecting fraudulent conveyances, which excepts from its operation chattel mortgages when allowed by law, a chattel mortgage duly executed and filed is not even *prima facie* fraudulent as against the mortgagor's creditors, though it provides that the mortgagor may retain possession of the goods. — *Reichert v. Simons*, Dak., 42 N. W. Rep. 657.

14. CONSTITUTIONAL LAW. — Section 6, of Laws Ill. 1887, p. 59, § 11, which provides that "the shareholders of each association formed under this act shall be individually responsible equally and ratably, and not one for the other, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested for such shares," is in conflict with Const. Ill. art. 11, § 6. — *Dupee v. Swigert*, Ill., 21 N. E. Rep. 622.

15. CONSTITUTIONAL LAW. — A contract for street work, made by a city at a time when there was no constitutional restriction can lawfully be extended, as to time of completion, by agreement made after passage of constitutional restriction, but before the expiration of the period originally fixed for completion. — *Ede v. Cogswell*, Cal., 21 Pac. Rep. 767.

16. CONSTITUTIONAL LAW. — That part of § 3, of an act of the legislature called "An act to regulate the practice of medicine in the State of Minnesota, and to license physicians and surgeons, which provides that the license therein contemplated shall only be granted 'by the consent of not less than seven members' of the board of examiners, does not confer upon said board the right or power to absolutely disregard the learning and qualifications of an applicant; or to unreasonably or arbitrarily reject his claims; or, at will, grant or refuse his certificate or license. — *State v. Fleischer*, Minn., 42 N. W. Rep. 696.

17. CONSTITUTIONAL LAW. — The act passed May 4, 1885, entitled "An act to regulate conditional rates and sales of personal property, and provide for filing instruments pertaining to the same with certain officers, and making a violation thereof a misdemeanor," is not in conflict with either § 16 or 19 of art. 1, or § 16 or 28 of art. 2, of the constitution. — *Weil v. State*, Ohio, 21 N. E. Rep. 643.

18. CONSTITUTIONAL LAW — Statutes — Republication. — So much of act Ala. Feb. 12, 1885, § 2, providing that it shall be unlawful to allow any loose animal to run at large upon the Bay shell road, as declares that any animal so found "may be by any officer or employee of said Bay Shell Road Company taken up and estrayed in the manner provided by art. 1 ch. 7, tit. 13, pt. 1, Code Ala.," is void, under Const. 1875, art. 4, § 2, which provides that "no law shall be revived, amended, or the provision thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length." — *Bay Shell Road Co. v. O'Donnell*, Ala., 38 Fed. Rep. 119.

19. CONTEMPT. — A court is not dissolved by a mere recess or necessary adjournment from one day to the next, and misbehavior affecting public justice, in the court-room, and in the immediate presence of the judge, while he is attending there to resume business when the hour of recess expires, is misbehavior in presence of the court, and may be punished summarily as a contempt of court. — *Baker v. Stagg*, Ga., 9 S. E. Rep. 743.

20. CONTRACTS — Validity. — In relation to transactions in grain for future delivery, no matter what colorings or semblances of reality are thrown about the alleged purchase, if the jury can see that all these forms were mere shams, and that there was in fact no actual *bona fide* dealing in the article itself, but that the forms were adopted to evade the law, and as a cloak for gambling, it is their duty to tear away the disguise, and treat the transaction as it is. — *Edwards v. Hoeflinghoff*, (U. S. C. C.) Ohio, 38 Fed. Rep. 635.

21. CONTRACTS. — Persons claiming to own letters patent assigned them to defendant in consideration of a certain sum paid, and of defendant's agreement to pay a further specified sum in case he established the validity of the patent in a suit previously brought by him, as licensee of the patent, for infringement against third persons, or in case he settled such suit without proceeding to final decree therein, and the assignors agreed to aid him in such suit, but the agreement contained no warranty of title: Held that, on a settlement of the suit by defendant without proceeding to trial, the assignors being ready and willing to aid him in the suit, he was liable on his agreement, even though his title was so defective that he could not have maintained the suit. — *Davis v. Hammond*, Mich., 42 N. W. Rep. 690.

22. CONTRACT — Reasonable Time. — A question of reasonable time arising upon parol evidence within which a purchaser of certain school-land leases was required to go upon, examine the land, and decide whether it proved to be of the quality as represented, there being a dispute as to the facts and conflict of evidence: Held, to be a question of fact and not of law. — *Horie v. Hams*, Neb., 42 N. W. Rep. 711.

23. CORPORATIONS — Stock. — Where a mining corporation buys an adjoining property and transfers all the property to a new company, receiving stock in the new corporation therefor, and borrows money from one of its stockholders to pay the expenses thereof, there being no fraud, the company is liable for the money borrowed, and can levy an assessment to pay for it. — *Taylor v. North Star Gold Min. Co.*, Cal., 21 Pac. Rep. 753.

24. CORPORATIONS. — Code Iowa, § 1082, which provides that nothing contained in the chapter on corporations, nor any provision in the articles of incorporation, shall exempt the stockholder from individual liability to the amount of his unpaid subscriptions, does not apply where, by a valid agreement, to which the original creditor was a party, nothing is due or collectible on the stock. — *Callanan v. Windsor*, Iowa, 42 N. W. Rep. 652.

25. CORPORATIONS — Stockholders. — In Vermont, a married woman is competent to become a stockholder in a corporation and to contract to charge her separate property with the payment of any liability which is implied from entering into that relation. — *Witters v. Sovles*, (U. S. C. C.) Vt. 38 Fed. Rep. 700.

26. CRIMINAL LAW — Bastardy. — On a trial under the bastardy act the complaining witness testified that the defendant had sexual intercourse with her on a day named. The defendant thereupon, while testifying in his own behalf, denied that he had intercourse with her on that day: Held, (a) that any question relating to the situation of plaintiff and defendant while together on that day, or about that time, was proper on cross-examination; (b) that the denial of sexual intercourse on the day named was not a denial that such intercourse had taken place. — *Planck v. Bishop*, Neb., 42 N. W. Rep. 723.

27. CRIMINAL LAW — Perjury. — The duty imposed by § 3857 upon a justice of the peace of taking an appeal-bond "with good security," in case of an appeal from his judgment, carries by implication the authority to administer an oath and take sworn statements from a proposed surety, and false statements made under such oath constitute perjury. — *State v. Wilson*, Tenn., 11 S. W. Rep. 792.

28. CRIMINAL LAW — Larceny. — Code Tenn. §977, which is a part of the chapter relating to the local jurisdiction of offenses, provides that "where property is stolen in another State, and brought into this, the jurisdiction is in any county into which the property is brought." *Held*, that an indictment will lie in Tennessee for larceny of goods stolen in another State, and brought into Tennessee. — *State v. Matthews*, Tenn., 11 S. W. Rep. 793.

29. CRIMINAL LAW — Perjury. — Under Acts Mich. 1887, No. 137, § 10, perjury may be predicated upon the oath to a bill for divorce. — *People v. McCaffrey*, Mich., 42 N. W. Rep. 681.

30. CRIMINAL LAW — Murder. — On a trial for murder, evidence of statements concerning the crime made by defendant to one who he thought was a lawyer, but who was a newspaper reporter, while defendant was under arrest, and in the custody of officers who had repeatedly told him that it would be better for him to tell them all about the matter, and to keep his mouth shut if he could not tell the truth, and that they knew he had been lying, is inadmissible. — *People v. Stewart*, Mich., 42 N. W. Rep. 663.

31. CRIMINAL LAW — Homicide. — It is not erroneous to permit a properly qualified witness to express the opinion that a blow struck by the defendant upon the side of a house, just before the commencement of a quarrel, in the night time, between said defendant and another person, in which the latter was killed, sounded like a blow struck with a piece of iron. — *State v. Lucy*, Minn., 42 N. W. Rep. 697.

32. DAMAGES. — Where, in an action for personal injury, it appears that plaintiff's right arm has been rendered useless by the accident, it is proper to instruct the jury to take into consideration, in estimating the damages, plaintiff's future inability to labor or transact business, though at the time of the injury he was not engaged in any business or occupation, and there was no evidence of his earning ability. — *Fisher v. Jansen*, Ill., 21 N. E. Rep. 598.

33. DEED — Condition. — The law will not aid the enforcement of a condition in a deed avoiding it, if intoxicating liquors be sold on the premises where from the evidence it appears that the object of the vendor was to create a monopoly in the sale of liquor on the part of another party in the same place. — *Chippewa Lumber Co. v. Tremper*, Mich., 21 N. E. Rep. 532.

34. DESCENT AND DISTRIBUTION. — Intestate left no descendants, widow, or parents, but left a sister, descendants of four other sisters, and descendants of a deceased illegitimate son of his mother: *Held*, under Laws Ill. 1871-72, p. 352, § 1, that the illegitimate is entitled to inherit as if legitimate, and as he would have stood in the relation of a brother of the half-blood, if legitimate, and as the distinction between the whole and half-blood is abolished, he would have been entitled to share equally with the sisters, and his descendants are therefore entitled to a sixth of the estate. — *Elder v. Bales*, Ill., 21 N. E. Rep. 621.

35. EMINENT DOMAIN. — Where a railroad company, by condemnation proceedings, procures a right of way over land occupied by a person who holds the same as a timber culture claim under the laws of the United States, the title thereto being still in the United States, the occupant of the land can recover damages from the railroad company only for the diminished value of his interest in the land, and not for the diminished value of the land itself. — *Chicago, K. & W. R. Co. v. Hurst*, Kan., 21 Pac. Rep. 781.

36. EMINENT DOMAIN. — The map filed by a railroad company of the route on which it proposes to build a railroad is not the only evidence which may be offered in a condemnation proceeding to show the land condemned for right of way. — *Chicago, K. & W. R. Co. v. Grovier*, Kan., 21 Pac. Rep. 778.

37. EMINENT DOMAIN. — In an assessment of damages for land taken for a court-house, evidence of sales of similar estates in the neighborhood is admissible,

though made from five to twenty months after the taking of the land. — *Roberts v. City of Boston*, Mass., 21 N. E. Rep. 669.

38. EVIDENCE — Expert. — Where the opinion of an expert is sought upon the question of the insanity of the accused, the hypothetical questions to such expert must be so framed as to fairly reflect the facts admitted, or proved by other witnesses. — *Burgo v. State*, Neb., 42 N. W. Rep. 701.

39. EVIDENCE — Telegrams. — As between the sender and receiver of a telegram, the written message which is delivered to the receiver is the original, and is primary evidence, when the sender has taken the initiative in using the telegraph, and there is no evidence of any error in the transmission of the message. — *Anheuser Brewing Co. v. Huttmacher*, Ill., 21 N. E. Rep. 626.

40. EVIDENCE — Expert. — In an action by B, who was the owner and vendor of certain beef cattle, against F, the purchaser of said cattle for falsely weighing the same, and refusing to correctly weigh and give the true weight thereof, to the plaintiff's damage, upon the evidence, facts, and circumstances set out at length in the opinion: *Held*, that the opinion of witnesses of long experience in raising, feeding, hauling, and weighing cattle and hogs was admissible in evidence for the purpose of establishing the falsity of such weight. — *Filley v. Billings*, Neb., 42 N. W. Rep. 713.

41. EVIDENCE — Parol. — A written assignment of a judgment against a principal and surety by the plaintiff therein, containing no ambiguity, and using, the words "hereby giving him [the assignee] all the right and power to collect I have," cannot, in an action to enforce the same against the estate of the surety, be added to by oral proof that it was agreed by the assignee, when the assignment was made, that the surety's estate should not be required to pay the judgment. — *State v. Hoshaw*, Mo., 11 S. W. Rep. 753.

42. EXECUTORS AND ADMINISTRATORS. — On accounting by an administrator, where he is disallowed credit for investments made by him, the securities representing which he has delivered to his co-administratrix, who is also next of kin of the intestate, a decree requiring him to pay over to such next of kin her distributive share of the estate before she is required to deliver him the securities is inequitable. — *In re Niles*, N. Y., 21 N. E. Rep. 687.

43. EXECUTION. — Under Rev. St. Ill. 1874, p. 208, § 49, providing that whenever an execution shall have been issued against the property of a defendant in a judgment at law, and returned unsatisfied, the execution plaintiff may file a bill in chancery against defendant and any other person to compel the discovery of any property or thing in action belonging to defendant, a bill in chancery will not lie until execution has been issued to each county in which plaintiff knows or has reason to believe that defendant has property. — *Durand v. Gray*, Ill., 21 N. E. Rep. 610.

44. EXECUTION SALE. — A decree confirming the title of the purchaser of land at execution sale is conclusive against the parties and their privies, though the judgment on which the execution was issued is afterwards reversed on writ of error. — *Gould v. Sternburg*, Ill., 21 N. E. Rep. 628.

45. FEDERAL OFFENSE. — The word "obscene" within the meaning of act September 26, 1888, forbidding the sending of non-mailable matter through the mails, when used to describe a book, pamphlet, or paper means a publication containing immodest and indecent matter, the reading whereof would have a tendency to deprave or corrupt the minds of those into whose hands the publication might fall whose minds are open to such immoral influences. — *United States v. Clarke*, (U. S. D. C.) Mo., 38 Fed. Rep. 752.

46. FRAUDS — Statute of. — An undelivered deed to a third person, to which plaintiff is a stranger, and to connect him with which there is no written memorandum, is not sufficient to take a contract for the sale of land out of the statute of frauds, where it appears that

the third person repudiated the contract.—*Henderson v. Beard*, Ark., 11 S. W. Rep. 766.

47. FRAUDULENT CONVEYANCES.—Where the grantor of personal property was heavily indebted at the time of the conveyance, and soon after the transfer made statements in derogation of the *bona fides* thereof on his part, in a contest between the grantee and the creditors of the grantor over the property, such statements are proper to be proven for the purpose of showing fraud on the part of the grantor at the time of the conveyance, but not for the purpose of showing fraud on the part of the grantee or of impairing his title.—*Sloan v. Coburn*, Neb., 42 N. W. Rep. 726.

48. FRAUDULENT CONVEYANCES.—An assignment of securities upon the agreement to pay the assignor a fixed yearly sum for his support, should he demand so much, accompanied by a written agreement by the assignee to surrender back the property to the assignor whenever the latter should demand it, neither of the instruments being recorded, constitutes a secret trust for the benefit of the assignor, and is void under Rev. St. Ill. 1874, ch. 59.—*Tyler v. Tyler*, Ill., 21 N. E. Rep. 616.

49. FRAUDULENT CONVEYANCES.—A general creditor of a decedent's estate, whose claim remains partially unpaid after the assets in the administrator's hands are exhausted, may sue on behalf of himself and other creditors to set aside fraudulent conveyances of property made by decedent in his life-time, if the administrators, when requested, refuse to bring such an action as by Laws N. Y. 1868, ch. 314, § 1, they may do.—*Harvey v. McDonnell*, N. Y., 21 N. E. Rep. 696.

50. GAMING — Checks.—The indorsee of a check given for money lost at a game of cards cannot recover upon it against the drawer, though a *bona fide* holder for value without notice of the vice in the consideration. A check so drawn is within the provision of § 4269, Rev. St., and "absolutely void, and of no effect."—*Lagonda Nat. Bank v. Portner*, Ohio, 21 N. E. Rep. 634.

51. GARNISHMENT.—Before service can be had on a non-resident of the State, by publication, where one is served with attachment and garnishee process, it must appear that the party garnished has property of the defendant in his control, or is indebted to him.—*Searing v. Benton*, Kan., 21 Pac. Rep. 800.

52. HIGHWAYS.—Under Rev. St. Ind. § 5046, for relocation of highways, it does not affect the jurisdiction of the commissioners, nor prevent them from granting such a petition, that there is already a highway of sufficient width over the petitioners' lands at the point to which they desire to have the change made.—*Patton v. Cresswell*, Ind., 21 N. E. Rep. 663.

53. HIGHWAYS.—Proceedings by the township commissioner of highways to condemn land for the purpose of altering a highway, under How. St. Mich. ch. 29, §§ 1296-1305, are not irregular and premature because taken during the pendency of *certiorari* to review a former decision of the commissioner, discontinuing such highway, where such decision is afterwards held void.—*Weber v. Stagrady*, Mich., 42 N. W. Rep. 665.

54. HUSBAND AND WIFE—Contract.—An executory contract of a wife to support her husband, in consideration of a conveyance made by him to her, is void.—*Corcoran v. Corcoran*, Ind., 21 N. E. Rep. 468.

55. INJUNCTION.—Attorney's fees are recoverable in an action on an injunction undertaking, for services in obtaining a dissolution of the injunction.—*Nimocks v. Welles*, Kan., 21 Pac. Rep. 787.

56. INSURANCE.—Where, in a suit upon a policy of life insurance, the plaintiff relies upon the provision of a statute of the State of the company that issued it to avoid the effect of a forfeiture for non-payment of premiums, the facts bringing the case within such provision must be averred.—*Scheifers v. Massachusetts Mut. Life Ins. Co.*, Ohio, 21 N. E. Rep. 635.

57. INSURANCE.—A policy on a barn and the hay therein, provided that it should be void if, without the consent of the secretary, the risk should be increased

in any manner, or the property sold, or any change made in the title, or if the property should be incumbered, or used for purposes other than stated: *Held*, that a change in the title or use of the premises, or in the incumbrance, would not amount to a breach of the condition, unless the risk was thereby increased, or the security decreased.—*Russell v. Cedar Rapids Ins. Co.*, Iowa, 42 N. W. Rep. 654.

58. JUDGMENT.—A judgment entered by confession in vacation is not void by reason of the absence of an affidavit to the signature to the power of attorney under which it was confessed, but is voidable only at the instance of the debtor; and justifies a levy under an execution issued thereon, where the debtor makes no complaint against it.—*Gardner v. Bunn*, Ill., 21 N. E. Rep. 614.

59. JUDGMENTS.—Code Iowa, § 2529, provides that actions founded on unwritten contracts may be brought within five years after the cause accrues; those founded on written contracts within ten years; and those founded on a judgment within twenty years. Section 2589 provides that causes of action founded on contract may be revived by an admission in writing that the debt is unpaid: *Held*, that an action on a judgment is not an "action founded on contract" within the meaning of § 2539, and is not revived by an admission in writing.—*McAleer v. Clay County*, (U. S. C. C.) Iowa, 38 Fed. Rep. 707.

60. LANDLORD AND TENANT.—Where subtenants know that their lessor is a tenant, they are chargeable with knowledge of the terms of his lease, and, where it gives the landlord a lien for rent on the crops, those grown by them on the leased premises are subject thereto.—*Foster v. Reid*, Iowa, 42 N. W. Rep. 649.

61. LIBEL AND SLANDER.—In an action for slander, the alleged publication being that plaintiff, an unmarried female, was unchaste, and that she had become pregnant, and had committed an abortion, the court properly refused to make an order requiring her to submit her person to a medical examination, for the purpose of furnishing evidence under defendant's plea of justification.—*Kern v. Bridwell*, Ind., 21 N. E. Rep. 664.

62. LIMITATION OF ACTIONS.—An action for depreciation in the value of property by the construction and operation of railroad tracks in a street which such property adjoins, accrues when the tracks are laid, so as to set the statute of limitations in motion.—*Lyles v. Texas, etc. Ry. Co.*, Tex., 11 S. W. Rep. 782.

63. LIMITATION OF ACTIONS.—The limitation act of Illinois of 1845, § 8, provides that "every person in the actual possession of lands or tenements under claim and color of title made in good faith, and who shall for seven successive years continue in such possession, and shall also during said time pay all taxes legally assessed on such lands and tenements, shall be held" to be the legal owner: *Held*, that where a levy was in part for an unlawful purpose, payment of so much of the levy as was not for such unlawful purpose is a sufficient payment of "taxes legally assessed" under the statute.—*Grant v. Joliet, etc. R. Co.*, Ill., 21 N. E. Rep. 609.

64. MALICIOUS PROSECUTION.—To be relieved from an action in damages for malicious prosecution the defendant must rebut the *prima facie* proof of implied malice against him by showing honest belief, grounded on probable and reasonable cause.—*Cointement v. Cropper*, La., 6 South. Rep. 127.

65. MASTER AND SERVANT.—Under the evidence defendant held not liable for negligence where plaintiff, his servant, was injured in shaft of a mine in improperly using defective rope and bucket.—*Lendberg v. Brotherton Iron Min. Co.*, Mich., 42 N. W. Rep. 675.

66. MASTER AND SERVANT—Negligence.—Complaint of a defective railroad crossing, made to one who has no charge or control of the same, though he be a servant of the railway company, is no notice of the defect to the company.—*Union Pac. Ry. Co. v. Springsteen*, Kan., 1 Pac. Rep. 774.

67. MASTER AND SERVANT.—Fellow-servants.—A railroad company is liable to any one of its employees operating its road for the negligence of either one of its officers or employees whose duty it is to keep the road in a reasonably safe condition, and who culpably fails to perform such duty, or to give notice or warning thereof.—*Kansas City, etc. R. Co. v. Kier*, Kan., 21 Pac. Rep. 770.

68. MASTER AND SERVANT.—The traveling auditor of a railroad company, whose duties are to travel on the company's cars from station to station on its roads and audit accounts, is a servant of the company, and assumes the ordinary risks incident to the employment.—*Minty v. Union Pac. R. Co.*, Idaho, 21 Pac. Rep. 660.

69. MUNICIPAL CORPORATIONS.—Where a city grants to a company the exclusive privilege of laying gas mains and pipes under its streets for a term of years, on condition that the city shall have the right to purchase the company's gas plant at a certain time, on refusal by the company to sell at that time the city may treat the contract as annulled, so far as the grant of the exclusive privilege is concerned.—*Montgomery Gas Light Co. v. City Council*, Ala., 6 South. Rep. 113.

70. MUNICIPAL CORPORATIONS.—A bona fide resident of an incorporated city which, under its charter, has assumed exclusive control over the streets, alleys and highways within its corporate limits, cannot be required to work the public roads outside of the corporate limits of the city.—*Ex parte Roberts*, Tex., 11 S. W. Rep. 782.

71. MUNICIPAL CORPORATIONS.—In an action against a municipal corporation for damages sustained by a lot owner by reason of the excavation of a street in front of the property, for the purpose of reducing it to an established grade, the question of the proper method of proving damages cannot be for the first time raised in the supreme court.—*City of Omaha v. Schaller*, Neb., 42 N. W. Rep. 721.

72. MUNICIPAL CORPORATIONS.—Under Rev. Stat. Ind. 1881, § 3161, giving common councils of cities exclusive control and power over streets, alleys, highways and bridges within the limits of the cities, a public bridge within the limits of and located upon a public highway of a city constitutes a part of such highway, and where the city has taken charge of the same it is liable to a person suffering injury or loss without fault or negligence, through the neglect to keep such bridge in repair.—*City of Goshen v. Myers*, Ind., 21 N. E. Rep. 657.

73. MUNICIPAL CORPORATIONS.—Rev. Stat. Ill. 1874, ch. 24, art. 5, which empowers city councils to provide for and regulate the inspection of meat, poultry, etc., to prohibit any offensive or unwholesome business or establishment, and to do all acts and make all regulations necessary or expedient for the promotion of health or the suppression of disease, does not empower a city council to erect and maintain a public slaughter house, in the absence of any provision in its charter expressly conferring such power.—*Huesing v. City of Rock Island*, Ill., 21 N. E. Rep. 558.

74. NEGLIGENCE.—Evidence.—In an action for injuries alleged to have been caused by the negligent construction and management of an elevator, whereby it fell, evidence that no accident had ever before happened to the elevator during its use for four and a half years is inadmissible.—*Hodges v. Bearse*, Ill., 21 N. E. Rep. 612.

75. NEGLIGENCE.—Where men are rightfully at work on a trestle over which a railroad is operated, and the officers and persons operating the road have knowledge that the men are so at work, and that, by the operation and running of trains over the trestle while such work is being done, the men are thereby placed in great danger—under such circumstances it is the duty of the railroad company to operate and run its trains with care proportionate to the danger of the men so employed.—*Interstate, etc. R. Co. v. Fox*, Kan., 21 Pac. Rep. 797.

76. NEGLIGENCE.—While it is the fault of the servant, if he undertakes without sufficient skill, a sec-

tion man who complains of the bad condition of the tool with which he is to work, and is promised a new and good one, and is told to work with the defective tool until the others arrive, and, relying on such a promise, and there being no immediate danger, does so, and is injured by the use of the defective tool, is entitled to recover for the damages resulting.—*Southern Kan. Ry. Co. v. Crocker*, Kan., 21 Pac. Rep. 785.

77. NEGLIGENCE.—Where a contractor undertook to lay the track upon a newly constructed railroad for the railroad company owning or leasing the same, the company to furnish the construction train and the men necessary to operate it, they to be employed and paid by the company, and to whom alone they are responsible while running the train, the contractor having no authority to control them in that behalf, it was held that if, by the carelessness of those in charge of the train while passing over the track, an employee of the contractor, lawfully on the train, and without fault or negligence on his part, was injured, the railroad company owning and controlling the movement of the train would be liable for the damages sustained.—*Chicago, etc. R. Co. v. Clark*, Neb., 42 N. W. Rep. 703.

78. NEGLIGENCE.—To maintain an action for negligence, there must be shown to have existed some obligation or duty towards the party injured which the defendant has left undischarged or unfulfilled.—*Trask v. Shotwell*, Minn., 42 N. W. Rep. 699.

79. NEGOTIABLE INSTRUMENTS.—Though the complaint in an action on a note does not state that there is due thereon from defendant to plaintiffs a specified sum, as required by Code Civil Proc. N. Y. § 534, but merely alleges that plaintiffs are the lawful owners and holders of the note, which is set out, the defects in the complaint are cured by an answer which admits the execution of the note by defendant, and does not allege payment.—*Cohn v. Huson*, N. Y., 21 N. E. Rep. 703.

80. NUISANCE.—If a railroad company, lawfully located upon a street in a city, under its charter, and by permission of its local government, uses the street in the operation of its road, beyond what is necessary for the proper running of its trains, and by such successive and improper use substantially destroys the easement of way and of ingress and egress appurtenant to an abutting lot, the owner of such lot can maintain successive actions for such nuisance, recovering the damages that have accrued up to the time each action was brought, and a recovery in one action will not bar a subsequent one brought for a continuance of such wrongs.—*Jarman v. Louisville, etc. Co.*, Tenn., 11 S. W. Rep. 703.

81. PARTNERSHIP.—Where one of the members of a previously existing copartnership firm was the general manager thereof, and was to receive for his services "one-third of all profits arising from the business after deducting necessary expenses," he cannot, after the dissolution of the copartnership, but before the profits or losses are ascertained, maintain an action against the other members of the firm for the value of his services.—*O'Brien v. Smith*, Kan., 21 Pac. Rep. 784.

82. PLEADING.—Contributory negligence is a defense which necessarily implies negligence on the part of the defendant, and is therefore a plea of confession and avoidance.—*Watkins v. Southern Pac. R. Co.*, U. S. D. C. Oreg., 38 Fed. Rep. 711.

83. PRACTICE IN CIVIL CASES.—In executory process, the fact that the order of the judge indorsed on the petition, and authentic evidence attached thereto, was made before the documents were filed in court, affords no ground for relief, in the absence of proof of injury.—*Learned v. Walton*, La., 6 South. Rep. 125.

84. PRACTICE.—Misjoinder.—Under Rev. Stat. Ind. 1881, § 341, no judgment is reversible for error committed in sustaining or overruling a demurrer for misjoinder of causes of action.—*Langsdale v. Woolley*, Ind., 21 N. E. Rep. 659.

85. PRINCIPAL AND AGENT.—An agent who sells goods subject to the approval of his principal is not thereby a general agent, and proof of what such agent

said or did in relation to the goods after the order has been filled is not admissible against his principal without proof of his authority to bind his principal in that manner.—*Cleveland, etc. Co. v. Hovey*, Neb., 42 N. W. Rep. 707.

86. **QUO WARRANTO.**—*Quo warranto* is the proper remedy to determine the legal existence of a school district, and the right of particular persons to exercise the offices of moderator, assessor and director.—*People v. Gartland*, Mich., 42 N. W. Rep. 687.

87. **RAILROAD COMPANIES.**—A municipal ordinance which is afterwards validated by act of the legislature, granting the right of way along a certain street, the fee to which is in adjoining owners, to a railway company, and under which the latter constructs its road bed upon the street, is no defense to an action for the land brought by adjoining land owners against the railway company, as such use of the street is not within the scope of the public easement therein.—*Reichert v. St. Louis, etc. R. Co.*, Ark., 11 S. W. Rep. 696.

88. **REMOVAL OF CAUSES.**—Construction of act of 1887 as to prejudice and local influence.—*Thomson v. East Tenn., etc. R. Co.*, U. S. C. C. Tenn., 38 Fed. Rep. 673.

89. **RIGHT OF WAY.**—A finding that complainant is not entitled to a way by prescription is warranted, when the weight of evidence is that the way has not been kept in repair by complainant; that the original road bed has not been used for the length of time prescribed by statute, and that trees have been allowed to fall across the road and lie there, another way around them being used.—*Russell v. Napier*, Ga., 9 S. E. Rep. 746.

90. **SALES.**—Where a windmill is ordered, to be erected and put on trial, and the party ordering agrees to notify the one delivering and erecting it of any defect within thirty days after its erection, and he complained of one defect within that time, which was promptly remedied, but of no other, he cannot refuse to take the mill for the reason alone that it was defective in a part about which he made no complaint till after the thirty days had elapsed.—*Windmill Co. v. Piercy*, Kan., 21 Pac. Rep. 739.

91. **SHERIFFS—Liability—Failure to File Writ.**—In an action by a mortgagee against the sheriff, who made sale under the decrees of foreclosure, to recover damages for the sheriff's failure to file the order of sale with his return thereon in the clerk's office, whereby plaintiff was prevented from obtaining a deficiency judgment against the mortgagor, evidence that the sheriff's deputy, who actually made the sale, was a competent, prudent and careful man, was immaterial.—*Demond v. Boyd*, Cal., 21 Pac. Rep. 755.

92. **TAXATION.**—The validity of an assessment of taxes cannot be contested on a motion to vacate for irregularity a judgment for the recovery of the taxes and the sale of the land assessed.—*State v. Hunter*, Mo., 11 S. W. Rep. 756.

93. **TAXATION.**—At the time of listing plaintiff's property for taxation, plaintiff claimed that certain bank stock he owned should not be assessed, but should be offset by a debt due the bank. The assessor refused to do this, but "consented to and did report to the board of equalization," who ordered him to place it on his books for taxation: *Held*, that this was no "raising" of plaintiff's assessment, requiring the notice as provided in McClain's Ann. Code Iowa, § 1811.—*Jackson v. Chisum*, Iowa, 42 N. W. Rep. 650.

94. **TAXATION.**—Construction of revenue laws Art. ch. 7, providing for the publication of the delinquent tax-list and for the filing of complaint thereafter in the district court.—*At. & P. R. Co. v. Tawapai County*, Ariz., 21 Pac. Rep. 788.

95. **TAX-TITLES.**—In an action *quia timet*, for the purpose of removing the cloud cast by a tax-title from real property, it appeared that the plaintiff and those under whom he claimed had been in the exclusive, uninterrupted possession of said land for more than ten years, and that said taxes had accrued and said tax-deed been executed more than ten years before the bringing of the action: *Held*, that as the plaintiff sought equitable relief from said taxation and tax-

deed, notwithstanding the statute of limitations, he must, as a condition of relief, do equity by paying such taxes and interest.—*Wygant v. Dahl*, Neb., 42 N. W. Rep. 735.

96. **TAX-SALE.**—The omission of the name of the person to whom a tract of land is assessed from the notice of a tax-sale will not vitiate the title conveyed by the deed to the tax purchaser of the real estate.—*Ireland v. George*, Kan., 21 Pac. Rep. 776.

97. **TENDER—Mortgage.**—Under Civil Code Dak. § 849, a tender of the amount due on a mortgage, and deposit and notice thereof in compliance with the statute, is a satisfaction of the mortgage, within the meaning of section 1735, which provides that, "when any mortgage has been satisfied," the mortgagee must execute, acknowledge and deliver to the mortgagor a certificate of discharge thereof, or enter satisfaction on the record, so as to render the mortgagee liable to the penalty if he refused the tender, knowing it was of the correct amount.—*Kronebusch v. Raunin*, Dak., 42 N. W. Rep. 656.

98. **TENDER—Tort.**—No tender for damages arising in tort was allowed at common law. This rule has been modified by the provisions of section 523 of the Civil Code, so that a defendant in an action for damages arising in tort may, in his answer, offer to confess judgment for a specified sum.—*Fair Assn. v. Miller*, Kan., 21 Pac. Rep. 794.

99. **TOWNS—Officers.**—Under the township system of government, a supervisor is a township officer. To constitute a member of the county board of supervisors is a duty and franchise growing out of and incident to his office of township supervisor.—*State v. Taylor*, Neb., 42 N. W. Rep. 729.

100. **TRESPASS—Damages.**—A complaint in trespass, alleging that defendants entered plaintiff's close, and diverted the waters of his well, and frightened his wife, is not objectionable as presenting a misjoinder of causes of action.—*Razzo v. Varni*, Cal., 21 Pac. Rep. 762.

101. **TRUSTS—Trustees.**—Trustees having general power to invest personality and pay the income to their *cetui que trust* without directions as to the character of the securities in which the investment shall be made, may, after making an investment, sell the securities, and reinvest in others, if prudent to do so.—*Nat. Bank v. Jefferson*, Ky., 11 S. W. Rep. 767.

102. **TRUSTEES—Joint Liability.**—H, defendant's co-assignee in insolvency, collected in his own name certain of the trust funds, and deposited them in bank to the joint account of himself and defendant. Subsequently defendant united with H in drawing the funds from the bank, and in transferring them to the individual control of H, who was a private banker: *Held*, that defendant was responsible for the proper application of such funds.—*Bruen v. Gillet*, N. Y., 21 N. E. Rep. 676.

103. **WATERS.**—The effect of a series of statutes declaring what streams or portions of streams shall be navigable, which, after declaring a stream navigable between certain points, and repeatedly changing one of those points, omits the stream from the list of navigable waters entirely, is to declare by implication that the stream is non-navigable.—*Cardwell v. Sacramento County*, Cal., 21 Pac. Rep. 763.

104. **WILLS.**—A devise to a daughter for life, with remainder to her children, the survivors or survivor of them living at her death, vests the estate in remainder in the children living at the death of the testator as a class, and such estate will open and let in after born children, and will be defeated as to any child or children dying in the life-time of the mother.—*Kansas City Land Co. v. Hill*, Tenn., 11 S. W. Rep. 797.

105. **WILLS—Mental Incapacity.**—Where a complaint alleges that at the time of executing a codicil the testator's mind was "weak, debilitated and deranged, to such an extent as to incapacitate him from making or undertaking a will or codicil," a special issue, asking if testator at that time was "mentally incompetent" to make a codicil, is within the pleadings.—*In re Kohler's Estate*, Cal., 21 Pac. Rep. 758.